TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 782

JACK T. SKINNER, PETITIONER,

vs.

THE STATE OF OKLAHOMA, EX REL. MAC Q. WILLIAMSON, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

PETITION FOR CERTIORARI FILED DECEMBER 4, 1941.

CERTIORARI GRANTED JANUARY 12, 1942.

SUPREME COURT OF THE UNITED STATES

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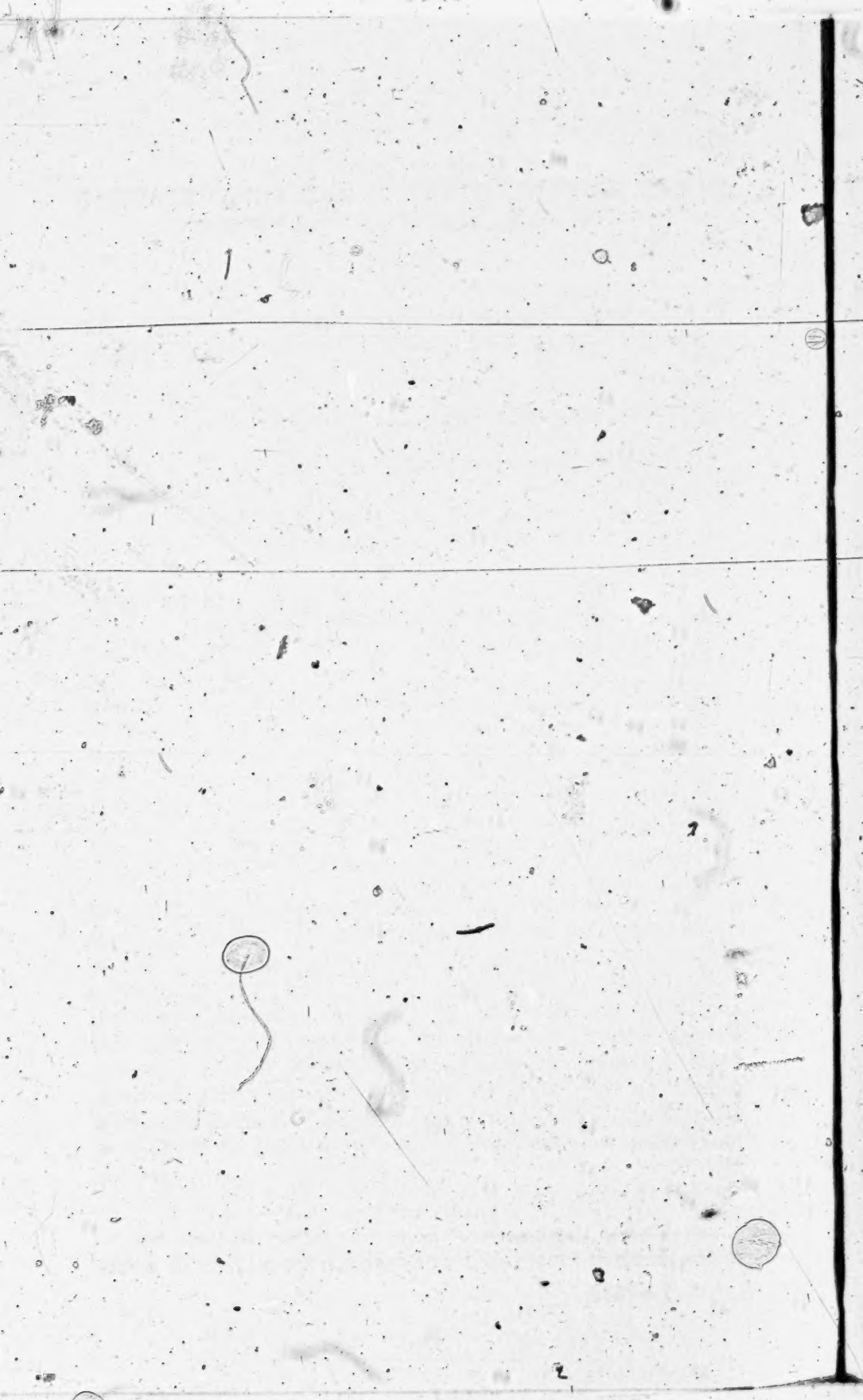

[fol. 1]

IN THE DISTRICT COURT IN AND FOR PITTSBURG COUNTY, STATE OF OKLAHOMA

No. 15734

THE STATE OF OKLAHOMA, ex Rel. MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, Plaintiff,

vs.

JACK T. SKINNER, Defendant

PETITION—Filed June 12, 1936

Comes now the State of Oklahoma, on relation of Mac Q. Williamson, Attorney General of the State of Oklahoma, and Owen J. Watts, Assistant Attorney General of the State of Oklahoma, and for cause of action against the defendant, alleges and states as follows, to-wit:

That Mac Q. Williamson is the duly elected, qualified and acting Attorney General of the State of Oklahoma, and that Owen J. Watts is the duly appointed, qualified and acting Assistant Attorney General of the State of Oklahoma, and that this action is authorized and brought pursuant to the authority vested in the Attorney General under Chapter 26 of the 1935 Session Laws of the State of Oklahoma.

I

That the said defendant, Jack T. Skinner, is an habitual criminal, he having been convicted three (3) times to final judgment for the commission of crimes amounting to felonies and involving moral turpitude, said cases being sepa- [fol. 2] rately brought and tried in courts of competent jurisdiction of the State of Oklahoma and the said defendant being sentenced therefor to serve terms of imprisonment in the Oklahoma State Reformatory and the Oklahoma State Penitentiary and that said defendant is now confined in the Oklahoma State Penitentiary at McAlester, Oklahoma, and that said defendant has been convicted in the following cases, to-wit:

(a) Under the name of Jasper Inghram in case No. — in the District Court of Pottawatomie County on or about

the 10th day of June 1926, he was convicted of the crime of Stealing Chickens and thereafter, on or about the 10th day of June 1926, was sentenced by said court to serve a term of eleven (11) months in the Oklahoma State Reformatory at Granite, Oklahoma, and was discharged from said Institution on or about the — day of January, 1927. A copy of the judgment and sentence of the court is hereto attached, marked "Plaintiff's Exhibit A" and made a part of this petition.

(b) As Joe Smith, in the District Court of Nowata County, in case No. —, on or about the — day of March 1929, he was convicted of the crime of Robbery with Firearms and thereafter, on or about the — day of March 1929 was sentenced by said court to serve a term of ten (10) years in the Oklahoma State Reformatory and incarcerated in the said Institution as No. 7085, and was received by said Institution on the — day of March 1929, a copy of the judgment and sentence of the court is hereto attached, marked "Plaintiff's Exhibit B" and made a part of this petition.

[fol. 3] (c) As Jack T. Skinner, in the District Court of Oklahoma County, in case No. 9743, on or about the 15th day of October, 1934, he was convicted of the crime of Robbery with Firearms and thereafter, on or about the 15th day of October 1934 was sentenced by said court to serve a term of ten (10) years in the Oklahoma State Penitentiary at McAlester, Oklahoma, and was incarcerated in said Institution and received there by the Warden of said Institution on the 17th day of October 1934 and was given prison number 30504, a copy of the judgment and sentence of the court is hereto attached, marked "Plaintiff's Exhibit C" and made a part of this petition.

II

That an operation, to-wit, the operation of vasectomy, may be performed upon the said Jack T. Skinner without detriment to the general health of the said Jack T. Skinner and that such an operation, if and when performed upon the said Jack T. Skinner, will have the effect of making him, the said Jack T. Skinner, sexually sterile, and that the welfare of the said Jack T. Skinner and of society

will be promoted by such sexual sterilization of the said Jack T. Skinner, and that upon a final hearing hereon that the court designate and appoint some capable and competent surgeon, duly qualified and licensed under the laws of the State to practice surgery, to perform the operation of vasectomy to render the said Jack T. Skinner sexually sterile.

Wherefore, Premises Considered, it is Prayed that a hearing hereon be had; that the court enter an order ad-
[fol. 4] judging said Jack T. Skinner an habitual criminal and authorizing and ordering an operation of vasectomy upon the said Jack T. Skinner to render him sexually sterile and that thereupon the court designate and appoint some capable and competent surgeon, duly qualified and licensed under the laws of this State to practice surgery, to perform the said operation of vasectomy; and to designate and fix the time of said operation not less than twenty (20) days from date of said Judgment, together with any and all other proper relief and for all costs of this action.

The State of Oklahoma, Mac Q. Williamson, Attorney General, (Signed) Owen J. Watts, Assistant Attorney General, Attorney for Plaintiff.

N. B.—(Exhibits are not attached to petition.)

[File endorsement omitted.]

[fol. 5] In District Court of Pittsburg County

Summons and Return

The State of Oklahoma to the Sheriff of Pittsburg County in said State, Greetings:

You are hereby commanded to notify the defendant Jack T. Skinner, also serve him with copy of plaintiff's Petition. That he has been sued by The State of Oklahoma, ex rel., Mack Q. Williamson, Attorney General of the State of Oklahoma in the District Court sitting in and for said County of Pittsburg, and that unless he answer by the 13th day of July 1936, the petition of said plaintiff against said defendant, filed in District Court, such petition will be taken as true and judgment rendered accordingly.

Suit Brought for Sterilization

If defendant fail to answer judgment will be taken as prayed for in plaintiff's petition for *the sum of $— with interest at the rate of — percentum per annum from the — day of ——, 19—, and an attorney's fee of $— and cost of suit —.*

You will make due return on this summons on or before the 22nd day of June, A. D. 1936.

Witness my hand and seal of said court affixed at my office in McAlester, Oklahoma, this 12th day of June, A. D. 1936.

Clay C. Jones, Court Clerk, by Homer W. Neece, Deputy. (Seal.)

[fol. 6] State of Oklahoma,
Pittsburg County, ss:

I received this summons on the 13th day of June, 1936, at 10 o'clock A. M. and executed the same in my county by delivering a true copy of the within summons with all endorsements thereon to the defendant Jack T. Skinner in person, June 16th, 1936.

H. H. Sherrill, Sheriff, by W. O. Merrill, Deputy.

Received and Filed in District Court Pittsburg County, Oklahoma, Jun. 13, 1936. Clay C. Jones, Court Clerk, by HWN, Deputy. I hereby certify that the within summons is a correct copy of the original summons, with all the endorsements thereon.

H. H. Sherrill, Sheriff, by —— ——, Deputy.

[fol. 7] In District Court of Pittsburg County

[Title omitted]

Answer and Plea in Bar—Filed August 12, 1936

Comes now the defendant, Jack T. Skinner, appearing for the purpose of this plea only and for no other purpose, involuntarily and under compulsion denies each, every and all allegations in plaintiff's petition contained except such as may be hereinafter specifically admitted, and without waiving any of his rights in the premises pleads as follows:

1. That the petition herein filed on its face wholly fails to state facts sufficient to charge this defendant with any crime offence or charge that would give the court jurisdiction

over the person of this defendant or empower the court to impose any penalty upon or against this defendant.

2. That the attempted accusation is sought to be made under an Act of the Legislature, wholly void on its *fact*, and in violation of the Constitution of the State of Oklahoma, of the Constitution and laws of the United States of America in general and as most particularly set forth hereinafter.

3. That in each of the cases referred to in the first general [fol. 8] sub-division of the petition under sub-paragraphs (a), (b) and (c), the defendant was informed against, tried and convicted under the laws then in existence and the full penalty of the law imposed in each instance and that no other, further or additional penalty was at said time provided by law for either the first, second or third offence, and that the pretended Act of the Legislature, under the provisions of the Constitution and laws of the State of Oklahoma and the United States of America could not grant or confer power, jurisdiction or authority upon this or any other court to impose further or additional penalties of any kind or character for the commission of this or any other crime prior to the effective date of the said pretended Act of the Legislature, commonly known and referred to as "The Sterilization Act", Senate Bill #14, Chapter 26, Article 1, of the Session Laws of Oklahoma, 1935 as published.

4. The defendant further respectfully denies that the said aforesaid Chapter 26, Article 1, of the Session Laws of Oklahoma, 1935, has or could have application to any so called habitual criminal whose last conviction occurred prior to August 14, 1935, the earliest date upon which said act could have become effective, if valid and constitutional, and your defendant further alleges the facts to be, and as shown by the petition of the plaintiff, that his alleged last [fol. 9] conviction occurred on or about the 15th day of October, 1934, long prior to the passage of said Act of the 1935 Legislature.

5. Defendant pleads his former conviction as set forth in plaintiff's petition, sub-paragraphs (a), (b) and (c) of general Paragraph 1, as set forth on Page 2 of the Petition, in bar of any further penalties which may be imposed by law and any other interpretation or attempted application of said Act of the Legislature would be and constitutes the said

Act of the Legislature as a retroactive law imposing additional penalties than those provided by law and would in effect, become an ex post facto law, expressly prohibited by the Constitution of this State and of the United States.

6. Further pleading his former convictions as a bar to further prosecutions or penalties, the defendant alleges that in each of his said convictions set forth under subparagraphs (a), (b) and (c) above referred to in plaintiff's petition, informations were duly filed in each said cause in the respective courts, and the constitutional requirements and legal procedure pursued by the State of Oklahoma against this defendant in each of said causes and upon judgment of conviction, the full penalty provided by law was assessed and judgments rendered accordingly; that by reason thereof, said judgments have become final and conclusive, and your defendant has satisfied each of the first and second penalties and is now incarcerated at McAlester, [fol. 10] Oklahoma, in the State Penitentiary in accordance with the judgment of the District Court of Oklahoma County in case #9743, serving a sentence of 10 (ten) years, which began on the 15th day of October, 1934, and will expire and be fully satisfied on or about the — day of ——, 1940; that each of said judgments having become final and the two first judgments having been satisfied, there remains only the requirements for this defendant to satisfy the remainder of the judgment and sentence in the last case, and, no further, other or additional penalty can ever be imposed therefor, and your defendant expressly pleads his former jeopardy, conviction and sentence as a bar to any further charge of any kind or character growing out of or connected with the commission of any such crime or the conviction therefor.

7. Defendant further expressly pleads that the so-called Senate Bill #14, Chapter 26, Article 1, Oklahoma Session Laws of 1935, as published, in so far as it applies to this defendant or any other person convicted prior to the effective date of said Act, would be and is unconstitutional and in addition to imposing the penalties therein prescribed, would be and constitute a violation of the constitutional rights and guarantees of this defendant and other similarly situated.

8. Defendant further alleges that the so-called Senate Bill #14, Chapter 26, Article 1, Oklahoma Session Laws of 1935,

is wholly unconstitutional and void as being in violation of [fol. 11] the 5th Amendment of the Constitution of the United States, and the provisions of the Constitution of the State of Oklahoma.

9. That the provisions of said pretended Act of the Legislature are violative of Article 8, known as the 8th Amendment of the Constitution of the United States of America, and in violation of the Provisions of the Constitution of the State of Oklahoma.

10. That the said pretended Act of the Legislature in effect results in an arbitrary imposition of penalties without due process of law as defined by the Constitution of the United States and the State of Oklahoma, and the penalties imposed or attempted to be imposed, would result in arbitrarily depriving the defendant of his right to trial by jury and to proceedings generally classified and known as "due process of law" for the protection of the rights and liberties of the people.

11. That said pretended Act of the Legislature is unconstitutional and void for the reason that it is and shows upon its face to be and constitutes arbitrary class legislation, seeking to impose penalties upon individuals in a class of people, in violation of equal protection claus- of the Constitution of the United States and of the State of Oklahoma.

12. That the said pretended Act of the Legislature, under and pursuant to which the petition herein was filed, although the same pretends to provide for trial before a court and in certain cases, trial to a jury, yet your defendant respectfully alleges, states and shows that the question of left to be [fol. 12] determined by the court or jury are so limited in extent as to amount to an arbitrary denial of judicial proceedings and an arbitrary imposition by the Legislature of additional punishment or penalties without due process of law, and contrary to the positive provisions of the Constitution of this State and of the United States of America.

13. Your defendant admits that Mac Q. Williamson is Attorney General of the State of Oklahoma, and that Owen J. Watts is the Assistant Attorney General of the State of Oklahoma, duly qualified and acting.

14. That the pretended Act of the Legislature is special and in violation of the provisions of the Constitution of the State of Oklahoma, and does not apply generally as

provided and required by the Constitution and the laws of this State and the Constitution of the United States.

15. That under the language, terms and provisions of Section 3 of said Act, under the facts and allegations set forth in plaintiff's petition, this defendant denies that he is within the class coming under the terms of the provisions of said Act for the reason that he has not been tried and convicted in an action wherein he had been twice or more times convicted to final judgment for the commission of crimes involving moral turpitude, separately brought and tried, and has not twice been convicted to final judgment in a court of competent jurisdiction in this State for the commission of a crime amounting to a felony involving moral turpitude as provided by the terms and provisions of said Act.

16. Wherefore, having answered and denied and inter-
[fol. 13] posed his plea defendant demands that in event his plea in bar be denied or over-ruled, that he be granted privilege of trial by jury, and this demand and request is made without waiving any of his constitutional rights otherwise provided for under the Constitution of the State of Oklahoma or of the United States of America.

Wherefore, defendant prays that he go hence free, without further day or date, and that the prayer of plaintiff's petition be denied upon each, every and all the grounds set forth herein, and for all further proper and lawful relief.

Jack T. Skinner, Defendant, by Claud Briggs, His Attorney.

[File endorsement omitted.]

[fol. 14] IN DISTRICT COURT OF PITTSBURG COUNTY

[Title omitted]

GENERAL INSTRUCTIONS OF THE COURT—Filed October 20, 1936

GENTLEMEN OF THE JURY:

I

This is an action instituted by the State of Oklahoma by its attorney general wherein the petition alleges that the defendant herein is an habitual criminal having been convicted three times to find judgment for the commission

of crimes amounting to felonies involving moral turpitude, and that under the judgments and convictions he was sentenced on each of the charges to serve terms of imprisonment either in the State Reformatory or the Oklahoma State Penitentiary, and is now confined in the Oklahoma State Penitentiary at McAlester.

The petition states that the defendant under the name of Jasper Inghram in the district court of Pottawatomie County, Oklahoma, on or about the 10th day of June, 1926, was convicted of the crime of stealing chickens and that thereafter on or about said 10th day of June, 1926, was sentenced by said court to serve a term of eleven (11) months in the Oklahoma State Reformatory at Granite; [fol. 15] that he served said term in said institution and was discharged therefrom.

The petition further states that the defendant as Joe Smith in the district court of Nowata county, in March, 1929 was convicted of the crime of robbery with firearms and was sentenced by said court to serve a term of ten years in the Oklahoma State Reformatory at Granite, Oklahoma, and was received by said institution and served the sentence therein.

The petition further states that the defendant as Jack T. Skinner on or about the 15th day of October, 1934, was convicted of the crime of robbery with firearms in Oklahoma County and on said date was sentenced by said court to serve a term of ten years in the Oklahoma State Penitentiary at McAlester and was incarcerated in said institution, received there by the warden on the 17th day of October, 1934, where he is now confined.

The petition further alleges that the operation of vasectomy should be performed upon the said defendant, that the same can be done without detriment to the general health of said defendant; that the same will have the effect of making him sexually sterile, that the welfare of said defendant and of society will be promoted by such sexual sterilization; that the court appoint a capable and competent surgeon duly qualified and licensed under the law to practice surgery to perform the operation of vasectomy upon the said defendant herein, and furthermore prays for an order directing that this be done.

Objected to by defendant.

Objection overruled and exceptions allowed.

R. W. Higgins, Judge.

[fol. 16] II

The defendant in answer and plea in bar pleads certain constitutional objections to the enforcement of the law which will be a matter of consideration by the court, but not by you gentlemen.

The defendant in his answer does not deny the convictions as set forth in the petition, but in his evidence admits it but pleads that the operation requested by the State will be detrimental to his general health and asks at your hands that for that reason that he be not ordered made sterile by forced operation upon him.

Given over objections of defendant. Defendant excepted and exceptions allowed.

R. W. Higgins, Judge.

III

The law that this case is being prosecuted under is provided for in Chapter 26, of the Session Laws of 1935, wherein it is provided that where one having been convicted twice or more times for the commission of crime amounting to felonies involving moral turpitude separately brought and tried either in a court of competent jurisdiction of the State of Oklahoma or any other State of the United States, and is convicted therein to final judgment of a crime amounting to a felony involving moral turpitude and sentenced to serve a term of imprisonment in the [fol. 17] Oklahoma State Penitentiary of the Oklahoma State reformatory, or any other penal institution, now or hereafter established and maintained in the State of Oklahoma, shall be adjudged to be an habitual criminal as herein defined, and shall upon adjudication thereof becoming final, shall be operated upon and be rendered sexually sterile and it shall be the duty of the court to carry out a judgment so found, by appointing a qualified surgeon duly licensed under the laws of the state of Oklahoma, to carry out said judgment and perform the operation known as vasectomy.

Given over objections of defendant to which defendant excepts and exceptions allowed.

R. W. Higgins, Judge.

IV

The defendant upon the stand admits that he has heretofore been convicted separately of the crimes alleged

against him in the petition and has served time either in the State reformatory at Granite or the State Penitentiary at McAlester, and is now serving time in the Oklahoma State Penitentiary at McAlester for the third conviction.

Given over objections of defendant to which defendant excepted and exceptions allowed.

R. W. Higgins, Judge.

[fol. 18]

V

The court instructs you that the crime of stealing chickens and the crime of robbery with firearms are each a felony involving moral turpitude.

Given over objections of defendant, to which defendant excepts and exceptions allowed.

R. W. Higgins, Judge.

VI

The court instructs you that under the law and the evidence herein, the defendant herein is an habitual criminal.

Given over objections of defendant, to which defendant excepts and exceptions allowed.

R. W. Higgins, Judge.

VII

The only issue for your consideration in this case is whether or not the operation and effects thereof of vasectomy will be detrimental to the defendant's general health.

Given over objections of defendant to which defendant excepts and exceptions allowed.

R. W. Higgins, Judge.

[fol. 19]

VIII

If this operation and effects of same is a detriment to the general health of the defendant, then your findings should be in his favor, but on the other hand, if it be not a detriment to his general health your findings should be against him.

Given over objections of defendant and to which defendant excepts and exceptions allowed.

R. W. Higgins, Judge.

IX

The court instructs you that the burden is upon the State to convince your minds by a fair preponderance of the evi-

dence that the operation and effects thereof will not be detrimental to his general health.

Given over objections of defendant to which defendant excepts and exceptions allowed.

R. W. Higgins, Judge.

X

The court instructs you that should you find from a fair preponderance of the evidence in this case that said operation and effects thereof would not be detrimental to the general health of the defendant, then your findings should be in favor of the State, but on the other hand if you should [fol. 20] not so find, then your findings should be in favor of the defendant.

Given over objections of defendant, to which defendant excepts and exceptions allowed.

R. W. Higgins, Judge.

XI

You are the judges of the credibility of the witness- and the weight and value to be given to their testimony. You can take into consideration their demeanor on the stand, their fairness or lack of fairness, their interest, if any in the action, and their opportunity of knowing about the things they testify.

If your verdict be unanimous it need only be signed by your foreman. Nine or more of your number may return a verdict, but if such verdict is returned, then each of you agreeing thereto must sign the verdict.

R. W. Higgins, District Judge.

Given over objections of defendant, to which defendant excepts and exceptions allowed.

R. W. Higgins, Judge.

[File endorsement omitted.]

[fol. 21] IN THE DISTRICT COURT OF PITTSBURG COUNTY.

[Title omitted]

DEFENDANT'S REQUESTED INSTRUCTIONS—Filed October 20, 1936

Comes now the defendant, Jack T. Skinner, and requests the court to give the following instructions respectively in order numbered, to-wit:

Requested instruction #1:

You are instructed, gentlemen of the jury, that you should, under the proof, return a verdict in favor of the defendant.

Refused by the court, to which refusal, defendant excepts and exceptions allowed.

R. W. Higgins, Judge.

[File endorsement omitted.]

[fol. 22] Requested instruction #2:

You are instructed, gentlemen of the jury that the burden of proof in this case is upon the State to prove every material ingredient of the allegations of its petition beyond a reasonable doubt, and if the plaintiff has failed to satisfy your mind beyond a reasonable doubt, that the defendant can have the operation of vasectomy performed without injury or detriment to his general health, then your verdict should be for the defendant.

Refused by the Court, to which refusal the defendant excepts and exceptions were allowed.

R. W. Higgins, Judge.

[File endorsement omitted.]

[fol. 23] IN DISTRICT COURT OF PITTSBURG COUNTY

ORAL INSTRUCTION GIVEN AT REQUEST OF DEFENDANT

That thereafter, at the request of the Defendant, the Reporter was called into the Court Room and the court gave the following Oral Instruction:

Gentlemen, I have been requested to instruct you on the weight of evidence. You do not weigh evidence necessarily

by the number of witnesses, but you weigh it by the evidence that is most convincing to you of the truth. However, you are the judges of the weight of the evidence and the credibility of the witnesses.

[fol. 24] IN DISTRICT COURT OF PITTSBURG COUNTY

VERDICT—Filed October 20, 1936

Interrogatory ——

Do you find that the defendant may be sexually sterile by an operation of vasectomy, to be performed upon him without detriment to his general health?

(Answer "Yes" or "No") Yes.

J. J. Brewen, Foreman.

[File endorsement omitted.]

[fol. 25] IN DISTRICT COURT OF PITTSBURG COUNTY

[Title omitted]

MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO—Filed October 22, 1936

Comes now the defendant, Jack T. Skinner, and moves the court to set aside the general verdict and finding of the jury herein rendered and to render judgment in favor of the defendant, notwithstanding such verdict, for the following reasons to-wit:

1. That the said finding and verdict of the jury is inconsistent with the facts proven;

2. That the defendant is entitled to judgment both on the facts proven and the pleadings in said cause;

3. That the evidence is wholly insufficient to sustain the [fol. 26] fin*g*in-s in favor of the plaintiff on the issues submitted to the jury;

4. That the Act under which the defendant was tried is unconstitutional and void and the proceedings had herein are in violation of the constitutional rights of the defend-

ant both under the Constitution of the State of Oklahoma, and the Constitution of the United States of America.

Clay Briggs, John Morrison, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 27] IN DISTRICT COURT OF PITTSBURG COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed October 22, 1936

Comes now the defendant, Jack T. Skinner, and moves the court to vacate, set aside and hold for naught the verdict of the jury herein rendered and to grant the defendant a new trial for the following causes which affect materially the substantial rights of defendant.

1. That the special verdict or finding of the jury is not sustained by sufficient evidence and is contrary to law;

2. That the verdict or special finding of the jury is in disregard of the court's proper instructions;

3. For errors of law occurring at the trial and excepted to by the defendant;

4. Error of the court in over-ruling the objection of the defendant to the taking of any evidence in behalf of plaintiff under the pleadings and issues joined and under the special pleas in bar; to which ruling of the court, the defendant then and there excepted;

5. Error of the court in over-ruling the demurrer of the defendant to the evidence of the plaintiff; to which ruling [fol. 28] the defendant then and there excepted;

6. Error of the court in refusing the peremptory instructions requested by the defendant at the close of all the evidence; to which ruling the defendant duly excepted;

7. For error on the part of the court in over-ruling and disregarding the plea in bar and forcing said defendant to trial in violation of his constitutional rights; to which ruling the defendant duly excepted;

8. For error of the court in requiring the defendant to testify in behalf of the plaintiff over the objection of defendant and to which defendant excepted at the time;

9. Error of the court in refusing to grant the defendant additional peremptory challenges in the empaneling of the jury and in refusing to grant additional challenges upon the demand and request of the defendant and which was excepted to at the time;

10. For errors of law occurring at and during the trial of said cause and excepted to by the defendant;

11. Error by the court in sustaining objections made by the plaintiff to evidence offered on the part of the defendant and excepted to at the time;

12. For error by the court in sustaining objections to competent evidence offered by the defendant; to which ruling defendant at the time excepted;

13. For error on the part of the court in giving instructions numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, & 11, each of which were given over the objection of the defendant, and to the giving of which exceptions were taken at the time;

[fol. 29] 14. Error by the court in the failing to give requested instructions numbers—2 and 3;

15. For error committed by the court in over-ruling the special pleadings set out in the answer and plea in bar herein filed on the 12th day of August 1936, and numbered respectively 1 to 15, inclusive, which are hereby referred to and by reference incorporated herein as fully as if rewritten from said answer and plea in bar and to which ruling by the court the defendant excepted at the time;

16. That the court committed error in holding that the pretended Act of the Legislature was a valid exercise of police power and the penalty imposed is civil in nature and the proceedings a civil proceedings; that the Act of the court in forcing the defendant to trial under the pleadings and procedure invoked and enforced by the court was in violation of the due process of the law provisions of the constitution and said pretended Act was an arbitrary exercise of judicial power by the Legislature, contrary to the

Constitution of the State of Oklahoma and the United States.

Jack T. Skinner, Defendant, Claud Briggs, John Morrison, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 30] IN DISTRICT COURT OF PITTSBURG COUNTY

[Title omitted]

ORDER OVERRULING MOTION FOR NEW TRIAL—Filed July 31, 1937

Now on this 12th day of July 1937, this matter coming on to be considered upon the motion of the defendant for a new trial, and this being one of the regular judicial days of the July 1937 regular term of this court, and the court having considered the said motion in all of its phases and grounds and having heard oral argument presented in behalf of the defendant by his attorney, Claud Briggs, and in behalf of the plaintiff through Owen J. Watts, Assistant Attorney General, both appearing in person and the defendant being in court in his own proper person, the court after due consideration, doth find, order, adjudge, and decree that the motion for a new trial herein filed by the defendant, should be and is in all things overruled, to which ruling by the court, the defendant doth in open court, at the time, excepts, and his exceptions are by the court allowed, and ordered entered in the record;

And, the defendant doth now in open court give notice of [fol. 31] his intention to appeal from the action of this court in overruling said motion for a new trial, and upon agreement between the plaintiff through its attorney and the defendant through his attorney in open court, other and further or additional notice of appeal is waived, and it is ordered that the said defendant be and he is permitted and allowed an appeal as provided by law, and it is so ordered.

R. W. Higgins, Judge.

OK as to form.

Mac Q. Williamson, Atty. Gen., by Owen J. Watts, Assist. Atty. Gen., Atty. for Plf. Claud Briggs, Atty. for Defendant.

[File endorsement omitted.]

[fol. 32] IN DISTRICT COURT OF PITTSBURG COUNTY

No. 15734

STATE OF OKLAHOMA ex Rel. MAC Q. WILLIAMSON, Attorney Gen., Plaintiff,

vs.

JACK T. SKINNER, Defendant

JOURNAL ENTRY OF SENTENCE AND JUDGMENT BY THE COURT —Filed July 31, 1937

Now, on this 12th day of July, 1937, the same being one of the regular days of the 1937 regular term of this court, this cause coming on for final disposition after the court has overruled the defendant's motion for a new trial, as appears or heretofore herein entered, and the plaintiff being present in court by and through Owen J. Watts, Assistant Attorney General of the State of Oklahoma, and the defendant being present and in open court in his own proper person by his attorney, Claud Briggs, the court doth now over the objection of the defendant, find, order, adjudge and decree, as follows;

1. That in accordance with the verdict of the jury herein rendered, the court doth find and order that the defendant is an habitual criminal under, by and pursuant to the provisions of Senate Bill No. 14, being Chapter 26 of the Session Laws of the Oklahoma Legislature of 1935, to which [fol. 33] finding, order, judgment and decree, the defendant doth except and exceptions are by the court allowed;

2. The court doth further find, order, adjudge and decree in accordance with the verdict heretofore herein rendered by the jury, that the defendant may be rendered sexually sterile without detriment of his general health, to which further finding, order judgment and decree the defendant doth except and said exceptions are by the court allowed;

3. And, the Court doth find, order, adjudge, and decree that T. H. McCarley being a duly qualified physician and surgeon, and being a capable and competent surgeon, so qualified and licensed under the laws of this State to practice surgery, and he is by the court appointed to perform the operation of sterilization herein provided for, to which

further finding and order defendant doth except and exceptions are by the court allowed;

4. And, now the court doth further order and decree that Monday the 30th day of August 1937, be and the same is designated and fixed as the time, same being not less than twenty days from the day this judgment is rendered, for the performance of the operation of sterilization upon the defendant, at which time it is ordered that the said defendant submit himself to the operation, and be rendered sexually sterile as provided and contemplated by the provisions of the Act of the Legislature first above mentioned, to which further order and decree the defendant doth except and his exceptions are by the court allowed;

[fol. 34] 5. And, now it is the further judgment, decree, and sentence of this court that the defendant being in the custody of the Warden of the Oklahoma State Penitentiary, that he be retained in the custody of the said Warden of the Oklahoma State Penitentiary, and held in said Oklahoma State Penitentiary until such time as the operation of sterilization, provided for in this judgment, is performed, and a copy of this Order, Judgment and Sentence duly certified by the Clerk of this court shall be sufficient authority, and the Clerk of this court is ordered within ten days hereafter to deliver by mail or otherwise, to the surgeon named and designated in this judgment to perform this operation and sterilization, a copy of this Journal Entry of Judgment, duly certified by said clerk and said certified copy shall be sufficient authority for said surgeon to perform upon the defendant named herein, the sterilization operation specified herein, said operation to be performed at the time specified in the judgment or as soon thereafter as is convenient to the surgeon designated and appointed to perform the same, but without unreasonable or unnecessary delay, and after performing the said operation of sterilization, the said surgeon shall forthwith and without delay certify in writing to this court, that the operation actually and effectively has been performed, and the date and place when and where performed, as in said Act provided and required, to all of which defendant doth except and his exceptions are by the court allowed;

[fol. 35] And, now the defendant, Jack T. Skinner, in person and by his attorney, Claud Briggs, doth give notice in *open* court of intention to appeal and doth appeal to the

Supreme Court of the State of Oklahoma, from the findings, judgment and sentence of this court herein rendered, and the court doth allow an appeal without bond;

And, it is ordered that the said defendant be and he is allowed thirty days from this date within which to prepare and serve transcript of the record or case-made, ten days thereafter be allowed within which time either party *my* suggest amendments thereto, or corrections thereof, said transcript of the record or case-made to be settled and signed by the court upon five days notice to either party, said appeal to be perfected within sixty days after this judgment is rendered, unless for good cause shown this court extend the time within which such appeal may be taken, and, pending the perfection of the appeal herein prayed and allowed by the court, the judgment and sentence rendered and imposed herein shall be and the same is stayed, and the same shall not be executed during or pending appeal and/or until final disposition of this cause in the Supreme Court, and the further order of this court, and it is so ordered.

R. W. Higgins, Judge.

[fol. 36] OK as to form.

Mac Q. Williamson, Atty. Gen., by Owen J. Watts, Asst. Atty. Gen., Attys. for Plts. Claud Briggs, Atty. for defendant.

[File endorsement omitted.]

[fol. 37] IN SUPREME COURT OF OKLAHOMA

[File endorsement omitted]

JACK T. SKINNER, Plaintiff in error,

vs.

THE STATE OF OKLAHOMA, ex rel., MAC Q. WILLIAMSON, Attorney General of the State of Oklahoma, Defendant in error

PETITION IN ERROR—Filed Oct. 27, 1937

The said Jack T. Skinner, plaintiff in error, complains of the defendant in error, for that the said State of Oklahoma, ex rel Mac Q. Williamson, Attorney General of the State of Oklahoma, at the regular term of the District Court of Pittsburg County, State of Oklahoma, recovered

a judgment by the consideration of said Court against the said Jack T. Skinner, in a certain action then pending in said Court, wherein the said State of Oklahoma, ex rel Mac Q. Williamson, Attorney General, was plaintiff and the said Jack T. Skinner was defendant. The said judgment was rendered and sentence pronounced on the 12th, day of July, 1937, same being one of the regular days of the July, 1937, term of said Court. The original case-made duly signed, attested and filed or a certified transcript of the record of said Court, is hereto attached marked "Exhibit A" and made a part of this petition in error; and the said Jack T. Skinner, avers and alledges that there is error in the said record and proceedings in the following particulars, towit:

[fol. 38]

1

That the Court erred in over-ruling a motion of plaintiff in error, for a new trial.

2

That the Court erred in over-ruling plaintiff in error's special pleas in bar of the action to which ruling defendant in error excepted at the time.

3

That the Court erred in over-ruling plaintiff in error's specially interposed plea as to jurisdiction to which defendant in error excepted at the time.

4

That the Court erred in over-ruling plaintiff in error's objections to the impanelling of a jury and proceedings at the trial of said cause for the reasons assigned at the time and in the outset or beginning of the trial, to which the defendant in error duly excepted at the time.

5

That the Court erred in allowing only three pre-emptory challenges to jurors whereas plaintiff in error expressly requested five, which request was over-ruled and excepted to at the time.

6

That the Court erred in allowing plaintiff in error's counsel to advise and lecture the jury as to matters purely [fol. 39] of law over the objection of defendant in error, to which defendant in error excepted at the time.

7

That the Court erred in admitting incompetent, irrelevant and immaterial evidence offered by the defendant in error in the trial of said cause as to alleged former convictions of plaintiff in error, which were admitted in evidence over the objection of the plaintiff in error and excepted to at the time.

8

That the Court especially erred in admitting "Exhibit C" of defendant in error and other evidence concerning the conviction and sentence of plaintiff in error, for a crime alleged to have been committed prior thereto, the same being the so-called conviction, judgment and sentence upon which defendant in error sought to rely to obtain a verdict, judgment and sentence in this case, all of which occurred and was permitted by the Court over the specific objections of plaintiff in error and excepted to at the time.

9

The Court erred in compelling the plaintiff in error, Jack T. Skinner, to testify for defendant in error, over the protest and objection of the plaintiff in error, in an attempt upon the part of the plaintiff in error in the trial Court to establish material facts, to which the plaintiff in error then and there excepted.

[fol. 40]

10

That the Court erred in permitting the defendant in error to introduce other and additional incompetent, irrelevant, immaterial and prejudicial evidence over the objection of the plaintiff in error and excepted it in each instance at the time.

11

That the Court erred in over-ruling the demurrer of the plaintiff in error, Jack T. Skinner, to the evidence offered

on behalf of the defendant in error, in said trial Court, which demurrer was interposed in said Court after the defendant in error had introduced its evidence and rested, to which ruling the plaintiff in error excepted at the time.

12

That the Court erred in refusing to admit competent, relevant and material evidence offered by the plaintiff in error, to which exceptions were taken at the time in each instance.

13

That the Court erred in giving to the jury instructions No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, each of which were given over the objection to the plaintiff in error, and to the — of each the said plaintiff in error excepted at the time.

14

That the trial Court erred in refusing to give plaintiff in error specially requested instructions No. 1 & 2 to which exceptions were taken at the time.

[fol. 41]

15

That the Court erred in admitting and in taking any evidence on the part of the defendant in error, over the objections of plaintiff in error at the time of the commencement of the trial.

16

That the Court erred in not sustaining motion of defendant in error for judgment non-obstante veredicto.

17

That the Court erred in pronouncing and entering sentence and judgment in the 12th day of July, 1937, based upon the verdict of the jury and the proceeding had in said cause, for the reasons and on the grounds set forth in plaintiff in error's original pleadings interposed in bar and objections to the jurisdiction of the Court, and for the further reason set forth in the motion for new trial, to all of which plaintiff in error then and there excepted.

18

That the trial Court erred in the proceedings herein, in that the said proceeding and trial was had and attempted

under an act of the legislature, designated as Chapter 26, Article 1, of the Session Laws of 1935, known as Senate Bill No. 14, in that in so far as the undisputed facts proven in this cause show that by the terms of the said action of the legislature and the application of the same to the undis- [fol. 42] puted facts herein, the said act of the legislature is unconstitutional, void and would be and is violative of the provisions of the Constitution of the State of Oklahoma and the United States of America, specifically prohibiting "cruel and unusual punishment" denying "due process of law", prohibiting the enactment of "ex post facto laws", and the said act is contrary to the further provisions of the Constitution of the State of Oklahoma and the United States of America, providing that "no person shall be twice placed in jeopardy for the same offense", all of which said proceeding, trial, sentence and judgment in this proceeding was had over the specific objection, special pleas interposed and in each instance excepted to at the time.

Wherefore, plaintiff in error, prays that said judgment so rendered may be reversed and the plaintiff in error herein be restored to all rights that he has lost by the rendition of such judgment, and for such other and further relief as the Court may seem proper in the premises.

Claud Briggs, John Morrison, Attorneys for Plaintiff in Error.

[fol. 43] IN SUPREME COURT OF OKLAHOMA

No. 28,299

JACK T. SKINNER, Plaintiff in Error,

vs.

STATE OF OKLAHOMA ex rel., MAC Q. WILLIAMSON, Attorney General, Defendant in Error

OPINION—Filed February 18, 1941

Syllabus

1. Art. 1, Ch. 26, S. L. 1935, 57 O. S. A. 171-195, known as the Habitual Criminal Sterilization Act is a eugenic measure and not a penal law and does not violate Sec. 9,

Art. 2 of the State Constitution prohibiting cruel and unusual punishment, or Sec. 15, Art. 2 of the Constitution, prohibiting the enactment of a bill of attainder or ex post facto law.

2. In determining whether a statute is a reasonable exercise of the police power as against the unlawful infringement of a constitutional right, all presumptions of validity surrounding legislation will be indulged, and such a statute will not be declared unconstitutional unless it appears beyond a reasonable doubt that there is no real or substantial connection between the provisions thereof and the preservation of the public health, safety, morals, or general welfare.

[fol. 44] 3. Where the Legislature had determined a fact as the basis for the enactment of a law under the police power of the state, the Supreme Court is not at liberty to declare the law unconstitutional as an infringement of an inherent or constitutional right unless it appears beyond a reasonable doubt that such findings of fact is clearly erroneous.

4. Art. 1, Ch. 26, S. L. 1935, 57 O. S. A. 171-195, which provides notice and an opportunity to be heard before a court or a jury, and provides that, "if the court or jury, as the case may be, find the defendant to be a habitual criminal, and, that said defendant may be rendered sexually sterile without detriment to his or her general health, then and in that event the court shall render judgment to the effect that said defendant be rendered sexually sterile, "does not deprive the defendant of due process of law because a third finding to the effect that the defendant is the probable potential parent of a child of criminal tendencies is not required, the legislative act being a sufficient finding of such fact.

Appeal from the District Court of Pittsburg County, Oklahoma

Honorable R. W. Higgins, Judge

Affirmed

Claud Briggs, John Morrison, Oklahoma City, Oklahoma, for Plaintiff in Error.

[fol. 45] Mac. Q. Williamson, Attorney General; Owen J. Watts, Assistant Attorney General, Oklahoma City, Oklahoma, for Defendant in Error.

HURST, J.:

This action was instituted in the district court by the State of Oklahoma against Jack T. Skinner under the provisions of Ch. 26, Art. 1, S. L. 1935, 57 O. S. A. 171-195, known as the "Oklahoma Habitual Criminal Sterilization Act."

The act was enacted pursuant to the police power of the state. It defines an habitual criminal to mean a person who has been convicted two or more times to final judgment of the commission of crimes amounting to felonies involving moral turpitude, either in a court of competent jurisdiction of this state or any other state, and is thereafter convicted to final judgment in a court of competent jurisdiction of this state of the commission of a crime amounting to a felony involving moral turpitude and sentenced to serve a term of imprisonment in an Oklahoma Penitentiary or Reformatory or any other like penal institution now or hereafter established by the state. Excepted from the act are persons convicted of offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses.

The act provides that any person adjudged to be such an habitual criminal shall be rendered sexually sterile; if a male, by the operation of vasectomy; and, if a female, by [fol. 46] the operation of salpingectomy.

The act provides that whenever it is brought to the attention of the Attorney General that any person has the status of an habitual criminal as defined by the act, the Attorney General shall commence a proceeding against such person by filing a petition in the district court in the county where he may be found and causing a summon to be issued by the clerk of the court. The act provides the form and contents of the petition and further, that the defendant shall file an answer. It further provides that the cause shall be set for trial any time after the expiration of ten days from the day defendant's answer is filed.

As to the trial, the material provisions are as follows: "And for the trial of such cases, the practice and procedure shall be that now or hereafter provided for in the Code of Civil Procedure of this state, so far as the same may be applicable to and not inconsistent with the provisions of this act." Either party may demand that the questions of fact arising from the issues made by the pleadings be tried to

a jury. "In the event the court or jury, as the case may be, finds the defendant not to be an habitual criminal, as herein defined, the court shall render judgment denying the plaintiff's petition. But if the court or jury, as the case may be, finds the defendant to be such an habitual criminal, and, that said defendant may be rendered sexually sterile without detriment to his or her general health, then and in that [fol. 47] event the court shall render judgment to the effect that said defendant be rendered sexually sterile."

The act further provides for an appeal to this court from the orders and judgment of the trial court. The act contains other provisions, but they have no bearing on the questions presented for determination on this appeal.

In the instant case a proceeding was filed against the defendant, Jack T. Skinner. The matter was submitted to a jury. Defendant, an inmate in the State Penitentiary, at McAlester, admitted that he had been convicted three times, —the first for stealing chickens, and his two subsequent convictions for robbery with firearms. The date of the last conviction was October 15, 1934, which was prior to the passage of the act. Under the provisions of the act, therefore, the only questions to be determined by the jury were (1) whether he was an habitual criminal as defined by the act, and (2) whether he might be rendered sexually sterile without detriment to his general health. Upon this question the parties introduced evidence and the jury found that the general health of the defendant would not be impaired by the operation. Under the findings of the jury the court entered its judgment ordering that the defendant be made sexually sterile, from which judgment the defendant has appealed.

There is ample evidence to support the findings of the jury on the issues left to its determination, and the primary purpose of this appeal is to test the constitutionality of the act.

[fol. 48] 1. It is contended that the act inflicts cruel and unusual punishment in violation of Sec. 9, Art. 2, of the Oklahoma Constitution, and further that the act constitutes a bill of attainder and is an ex post facto law, and is violative of Sec. 15, Art. 2, of the Oklahoma Constitution, and Sec. 10, Art. 1, of the Federal Constitution. These constitutional inhibitions have reference only to punishment for crime. 12 C. J. 1099, 1108; 11 Am. Jur. 1175, 1179. These contentions are, therefore, upon the premise that the

act in question is a penal law, and that sterilization is inflicted as a punishment.

Where the operation of vasectomy is required or authorized in a purely penal statute as a punishment for crime, it has been held to constitute cruel and unusual punishment. See Davis v. Berry, 216 Fed. 413; and Mickle v. Hendricks, 262 Fed. 687. However, in State v. Feilin (Wash.), 126 P. 75, construing a strictly penal statute, the court held that the operation did not constitute cruel and unusual punishment. But whatever may be our views on that question, if the act in question is a purely penal one, we are inclined to think it would be invalid as to defendant as an ex post facto law in that at the time defendant committed his last offense and was convicted therefor, the act in question had not yet been passed.

On the other hand, the objections now being urged, are not applicable where the operation of vasectomy is required as a eugenic measure, and not as a punishment. In such [fol. 49] case it is said to be analagous to compulsory vaccination and is non-punitive. In re Main, 162 Okla. 65, 19 P. 2d 153; Smith v. Cammand, Wayne County Probate Judge, 231 Mich. 409, 204 N. W. 140; State v. Troutman, 50 Idaho 673, 229 P. 668; Davis v. Walton, 74 Utah 80, 276 P. 921; Buck v. Bell, 143 Va. 310, 130 S. E. 516.

Therefore, the decisive question in connection with the determination of these constitutional objections is whether the act under consideration is a penal statute or a eugenic measure.

The rule of construction urged by defendant is that where the language of the statute is clear and unambiguous, there is no room for judicial construction and the words will be applied in their ordinary sense as they are usually understood. But there is nothing in the plain language of the act which classifies it as a penal one. In fact, the language is to the contrary. Therefore, we must look to the legislative intent as manifested from all parts of the act, keeping in mind that whenever reasonably possible, a statute must be so construed as to uphold its validity. 12 C. J. 787.

The act here provides that the procedure as in civil cases shall be applicable. The operation is not required as a part of any judgment of conviction or sentence. In fact, it is applicable to an habitual criminal within the meaning of the act, who may have served his sentence and been released. [fol. 50] We think it was the intention of the legislature

that this act should be a eugenic measure to improve the safety and general welfare of the race by preventing from being born persons who will probably become criminals. Whether they have properly pursued that purpose will be hereinafter discussed, but we think it was the intention that this be in no sense a criminal prosecution.

Defendant argues that the failure to provide a hearing on the question of whether he will likely beget criminal children shows that the Legislature had no eugenic purpose in mind. But that does not negative a eugenic intention, because the omission of such a finding simply shows that the Legislature was satisfied that criminal tendencies in all such persons are inheritable. Defendant further argues that the fact that the act applies to persons of any age and to persons sentenced to life imprisonment and does not provide for the operation at a time when they are about to be released, shows the intention to be penal rather then eugenic. But we do not think so. It is just as reasonable to presume that in passing a eugenic law, the Legislature was mindful of the fact that prisoners may escape, or be pardoned without affording an opportunity for the operation to be administered and did not think it wise in connection with the purpose sought to be accomplished to place age limits upon the law. We must bear in mind that we are not now speaking of the reasonableness of the classification but of the intention of the Legislature, and these matters do [fol. 51] not deny a eugenic purpose.

Our view of this matter disposes of defendant's contention that he was not allowed five preemptory challenges and was required to testify against himself, which objections would be pertinent only in a criminal proceeding.

2. It is next contended that the act violates the due process clause of both the State and Federal Constitutions.

"Due process" has a dual significance, as it pertains to procedure and substantive law. As to procedure it means "notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause." 12 Am. Jur. 267 #573; 16 C. J. S. 1153. In substantive law, due process may be characterized as a standard of reasonableness, and as such it is a limitation upon the exercise of the police power. 6 R. C. L. 433-446; 11 Am. Jur. 998, 1073-1081; 16 C. J. S. 1156.

It is our information that sterilization laws have been passed in at least twenty-seven states, ten of which deal with criminals of various classifications. Several of these acts have been declared valid in test cases, and a few declared unconstitutional for various reasons. See annotations, 40 A. L. R. 862; 87 A. L. R. 242. Thus it is seen that the sterilization of criminals as well as mental defectives as a eugenic measure may be effected under the police power of the state, provided the particular act fulfills the requirements of due process of law in its procedural aspects and the [fol. 52] provisions thereof reasonably appear to bear a real and substantial relation to the public health, safety, morals or some other phase of the general welfare.

The objection here made is that the act does not require a finding by the court or jury that by the laws of heredity, the defendant is the probable potential parent of children with criminal tendencies, and it is argued that the defendant is thereby deprived of a full hearing. This objection really goes to the question of due process in relation to substantive law, rather than procedure. The question is whether the legislation under consideration is a reasonable exercise of the police power in providing that all habitual criminals as therein defined shall be sterilized, for if it is proper to enact such a provision the procedural aspects are satisfied; that is, notice and a hearing on the issue of whether the particular defendant is such an habitual criminal and whether the operation will be detrimental to his health. If such provision is not proper, then the objection is that it is an unreasonable exercise of the police power, and not that the procedure is inadequate.

The determination of the reasonableness of the provisions of the act as an exercise of the police power is based upon the question of fact of whether habitual criminals as defined possess an inheritable tendency to crime which will be passed on to their children, if they are allowed to procreate. If that is true, then the act bears a real relation to the public welfare. If it is not true, the act would encroach [fol. 53] upon the constitutional rights of individuals without justification. In every case, where the court is called upon to decide whether a particular statute is a proper exercise of the police power as against an improper infringement upon constitutional rights, the court must before it can strike down the act decide that the existing facts do not justify the conclusion of the law-making body that the law

which they have enacted bears a real relation to health, safety or public welfare. In a measure the court exercised a supervisory fact-finding power when it declares that an act is or is not a reasonable exercise of the police power. But that supervision has very well defined limitations. The discretion of the Legislature is very great in the exercise of the police power. 11 Am. Jur. 1081; 6 R. C. L. 240. As long as the act does not infringe upon the inherent rights of life, liberty and property, the legislative determination as to the necessity of the regulation and the method employed is conclusive on the courts. 11 Am. jur. 1083; 6 R. C. L. 241; where the attempted public measure affects constitutional rights the legislative determination of the facts is not conclusive, and it is then that it is the duty of the courts to determine whether the proposed regulation is a proper exercise of the police power. 11 Am. Jur. 1084; 6 R. C. L. 242, 243. But all the presumptions of validity surrounding legislation apply in this situation, and it is presumed "that the legislature has carefully investigated and determined that the interests of the public require such legislation." 11 [fol. 54] Am. Jur. 1089. "It has been frequently stated, in cases where the questions are presented for judicial review, that in order to sustain legislation under the police power, the courts must be able to see that its operation tends in some degree to prevent some offense or evil or to preserve public health, morals, safety, and welfare * * *" 11 Am. Jur. 1087.

We must, therefore, assume that the Legislature had before it statistics, scientific works, and information from which it found as a fact that habitual criminals are more likely than not to beget children of like criminal tendencies who will probably become a burden upon society. 6 R. C. L. 111; 11 Am. Jur. 820. Based upon such a presumptive finding of fact, the legislation was enacted. That determination by the co-ordinate branch of the government having the duty to formulate the public policy of the state must be given great weight by the courts. Every presumption must be indulged in favor of the existence of facts which the Legislature assumed and acted upon, and we are not at liberty to strike down the act unless we can say beyond a reasonable doubt that the Legislature was clearly in error, and was wholly unwarranted and acted arbitrarily, in assuming or determining such facts. 6 R. C. L. 114; 11 Am. Jur. 794, 822; 12 C. J. 798; 16 C. J. S. 280. The authorities go so far

as to say that "if a state of facts which would justify the legislation can reasonably be conceived to exist, the court [fol. 55] must presume that it did exist when the law was passed." Cuthbertson v. Union Pacific Coal Co., 50 Wyo. 441, 62 P. 2d 311. See also 11 Am. Jur. 822. We all know that heredity plays some part in our mental, moral and physical make-up, but no one knows exactly what part it does play. We know that insanity and idiocy are hereditary and have sustained a law providing for the sterilization of such persons. In re Main, 162 Okla. 65; 19 P. 2d 153. Some authorities are of the opinion that habitual criminals have a trait of insanity and that such trait is hereditary. In passing the law under consideration the Legislature probably assumed this to be a fact. If such is a fact, the welfare of society dictates that the state shall, in the exercise of its police power, prevent such persons from reproducing their kind.

We think no one would doubt that this court should sustain the present law if it required a third finding to the effect that the accused is the potential parent of offspring with inherited criminal tendencies. But in the very nature of the case, testimony by expert witnesses on this question would be highly speculative and a finding by a jury or court, based upon such testimony, would likewise be speculative. The opinion of the experts would probably be based, in part at least, upon data that was available to, and considered by, the Legislature at the time of enacting the law. If a court or jury can make a finding of fact based upon such speculative evidence, we see no reason why the Legislature [fol. 56] cannot find or assume facts, based upon the same speculative evidence, as a basis for the exercise of the police power.

In Standard Oil Co. v. Marysville, 279 U. S. 582, in a unanimous opinion written by Mr. Justice Stone, it is said:

"We may not test in the balance of judicial review the weight and sufficiency of the facts to sustain the conclusion of the Legislative body."

And it was said by Mr. Justice Holmes, in Otis & Gassman v. Parker, 187 U. S. 606:

"• • • While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, un-

suited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. * * *"

See also Rast v. VanDeman & L. Co., 240 U. S. 342, L. R. A. 1917a, P. 421.

True, the laws providing for the sterilization of insane persons and habitual criminals usually provide that there be a finding that the accused is a probable potential parent of offspring that will be insane or criminal, but the fact that other statutes make such provision does not mean that they must do so. For some reason, not known to us and with which we should not concern ourselves, our Legislature [fol. 57] thought such provision not necessary or proper. It may be because it thought such a finding could not be based upon satisfactory proof. The Legislature should be allowed some latitude on this question.

We find nothing in the record that justifies a finding by this Court that the Legislature was clearly and beyond a reasonable doubt in error in assuming facts justifying the act as a proper exercise of the police power. Without such a showing, or unless the legislative determination is plainly contrary to those matters of common knowledge of which the Court may properly take judicial notice, we should not declare the Act unconstitutional. Our knowledge on the subject, which is not a knowledge of law but of science and observation, is not superior to that of members of the Legislature. The courts should be extremely careful not to trench on legislative discretion and power, and thereby violate Sec. 1, Art. 4, of the State Constitution providing for division of the powers of government among the three coordinate branches and that "neither shall exercise the powers properly belonging to either of the others." We must remember that the right to veto or repeal laws is not vested in the courts, and they are not concerned with the wisdom of the law.

3. Finally, the defendant contends that the Act denies him equal protection of the law in violation of the State and Federal Constitutions. The test of equal protection of the law is dependent upon the reasonableness of the classification. 6 R. C. L. 373. The act here applies to all habitual

[fol. 58] criminals as therein defined whether incarcerated in an institution or not. From what we have said above, it appears that the classification is reasonable and, therefore, there is no arbitrary or unlawful discrimination.

Judgment affirmed.

Welch, C. J., Riley, Bayless, Arnold, JJ., concur.
Corn, V. C. J., Osborn, Gibson, Davison, dissent.

[File endorsement omitted.]

[fol. 59] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER CORRECTING OPINION—Filed March 17, 1941

It is ordered that that part of the opinion found in lines 15 and 16 from top of page 7 of the typewritten opinion reading as follows:

"40 A. L. R. 862; 87 A. L. R. 242"

be and the same is hereby corrected to read as follows:

"40 A. L. R. 535; 51 A. L. R. 862; 87 A. L. R. 242."

Dated this the 15th day of March, 1941.

Earl Welch, Chief Justice.

[File endorsement omitted.]

[fol. 60] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 28,229

JACK T. SKINNER, Plaintiff in Error,

v.

THE STATE OF OKLAHOMA, ex Rel. MAC Q. WILLIAMSON, Attorney General, Defendant in Error

Order Correcting Opinion. See Order Attached

DISSENTING OPINION—Filed February 18, 1941

OSBORN, J. (Dissenting):

Due to the importance of the constitutional question determined by the majority opinion herein, I deem it proper in dissenting thereto to express briefly my reasons for such dissent.

That the field of legislation covered by the Act comes within the proper sphere of legislative action is, I think no longer open to question. Buck v. Bell, 274 U. S. 200, 71 L. Ed. 1000, 47 S. Ct. 584; 40 A. L. R. 535; 51 A. L. R. 862; 87 A. L. R. 242; 126 A. L. R. 535. I concede that the Legislature can lawfully provide that one fact shall be prima facie evidence of another fact, if there is some rational connection between them. 12 Am. Jur., p. 248, sec. 552, of Const. Law; 11 Am. Jur., pp. 919, 920, sec. 213, Const. Law. Such legislation must bear some real and substantial relation to the public health, safety, morals or some other phase [fol. 61] of general welfare. Atlantic Coast Line Ry. Co. v. City of Goldsboro, 58 L. Ed. 721; Chicago B. & Q. Ry. Co. v. Illinois, 50 L. Ed. 596; Ligget Co. v. Baldridge, 73 L. Ed. 204; 12 C. J., p. 929, par. 441.

While great weight will be given to the finding by the Legislature of the necessity and propriety of the legislation and the courts will not declare same invalid unless it can be said beyond reasonable doubt that the legislative determination is erroneous, such rule does not apply in all its force when the inherent constitutional rights of citizens are involved. In 11 Am. Jur. 1084, sec. 305, it is said:

"Legislative determination is conclusive upon the courts only within constitutional limits, which leaves open for judicial inquiry all questions as to the actual effect of attempted police measures upon constitutional rights. The reasons for the rule are patent. Since the judicial branch of the government ascertains the validity of all legislation as measured by the Federal and state Constitutions and since the police power is subordinate to the organic law, the broad scope of the power does not place every regulation touching it within legislative competence, because of the power of the courts to determine whether legislative action conflicts with the organic law or is arbitrary and unreasonable and therefore void. Hence, a determination by the [fol. 62] legislature as to what is a proper exercise of the police power is not final and conclusive, but is subject to the supervision of the courts."

In the Act under consideration the Legislature has, in my judgment, restricted the power of the court in its hearing of applications filed thereunder to unreasonable, illegal and, I may add, unwise lengths, in that it provides: "But

if the court or jury, as the case may be, find the defendant to be such an habitual criminal, and, that said defendant may be rendered sexually sterile without detriment to his or her general health, then and in that event the court shall render judgment to the effect that said defendant be rendered sexually sterile."

The right to beget children is one of the highest natural and inherent rights, protected by section 7 article 2 of the Constitution of the State and the 14th Amendment to the Constitution of the United States relating to due process. The hearing provided by the Act does not provide for inquiry into any possible criminal traits of the person informed against and requires no finding as to whether or not such traits are transmittable to his posterity, nor whether by accident, disease, age, infirmity or for other reasons such person is reasonably capable of producing off-[fol. 63] spring, either criminal, degenerate or imbicile, against which the Legislature may legitimately seek to protect society. Herein the Act under consideration substantially differs from the Act under consideration in In re Main, 162 Okl. 65, 19 P. (2d) 153, constitutionality of which was upheld by this court with the writer hereof concurring.

Thus it is my view that the Act under consideration deprives persons of constitutional rights without due process of law and offends against the State and Federal Constitutions.

For these reasons I respectfully dissent.

Corn, V. C. J. and Gibson and Davison, JJ.: Concur herein.

[fol. 64] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER CORRECTING DISSENTING OPINION—Filed April 4, 1941

It Is Hereby Ordered, that the Dissenting opinion filed in the above styled and numbered cause on February 18, 1941, be corrected by striking from the third line from the botton of page one of said opinion the citation "12 C. J., p.

929, par. 441", and placing in lieu thereof th citation "16 C. J. S., Constitutional Law, par. 195".

Dated this the 4th day of April, 1941.

Monroe Osborn, Justice.

[fol. 65] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR RE-HEARING—Filed May 31, 1941

Comes now Jack T. Skinner, Plaintiff in Error, and respectfully represents to the Court that on the 18th day of February 1941, an Opinion with force and effect of the decree and judgment was rendered by this Court in the above styled and numbered cause affirming a judgment and sentence of the District Court of Pittsburg County, Oklahoma subjecting the plaintiff in error to the penalties provided under what is known as the "Habitual Criminal Sterilization Act of the State of Oklahoma (Article 1, Chapter 26, S. L. 1935) which said Opinion plaintiff in error alleges to be erroneous and that a rehearing should be granted, the said Opinion withdrawn and the cause reversed and in support thereof, plaintiff in error alleges as follows:

1

That said decision overlooked a question decisive of the cause and duly submitted by counsel, in that in the original petition in error and his briefs and arguments in support thereof, plaintiff in error called attention to the Court to the fact affirmatively shown by the record that the third conviction relied on by plaintiff below, occurred prior to the [fol. 66] enactment of the statute in question; that is to say, the plaintiff in error on the 15th day of October 1934, was convicted and sentenced to serve a term of ten (10) years in the Oklahoma State Penitentiary and the Act in question was passed by the 1935 Legislature and approved by the Governor on May 14th, 1935 without the emergency clause, consequently, did not become effective until the expiration of ninety (90) days after the Session. It would, therefore, be seen that the conviction of plaintiff in error for the last offense occurred seven months prior to the time the Act was passed and more than ten months prior to the effective date

of the Act; that by reason thereof this Act would automatically be and become an ex post facto law if made applicable to the plaintiff in error.

2

That said decision and opinion is in direct conflict with former controlling decisions of this court in that the said decision holds that the Act in question is not a penal law and does not violate section 9, article 2, of the constitution with reference to "cruel and u-sual punishment, or section 15, article 2 of the constitution prohibiting enactment of Bill of Attainder or ex post facto law"; that prior decisions of this court, which will be set forth in the brief in support hereof, and which are controlling in the definition of penal statutes, definitely and conclusively establish the said Act to be penal.

3

That the said opinion is further in conflict with the controlling decisions in that the opinion determines that the [fol. 67] Act is an eugenic measure and not a penal statute when upon the force of the Act and from its text there is not the slightest possible remote suggestion that the Act was even intended as an eugenic measure. On the contrary the Act specifically denotes its intent to be a criminal penal measure and by reason of this specific classification from its own text it could not be upheld as constitutional and could only be upheld if and when enacted in such a manner and with such provisions as would entitle the State to impose the penalty of sterilization as a part of the judgment and sentence of conviction on the prosecution of any third or subsequent offense.

4

That in any event regardless of the decision of the Court as to the validity or applicability of the Act in question, those convicted subsequent to its effective date, the Court must, to avoid the ex post facto feature, or retroactive effect, find and determine that the conviction, judgment and sentence imposed on this plaintiff in error must be vacated, set aside and held for naught; that even though the Act be not a criminal or penal Act it would be violative of the constitutional rights of the plaintiff in error to determine that he be subjected to the penalties of the Act for some act committed prior to the passage of the law.

[fol. 68] Wherefore, plaintiff in error prays a rehearing of said cause be granted by the Honorable Court and that on rehearing judgment and sentence of the District Court of Pittsburg County be vacated with directions to dismiss.

Claud Briggs, Attorney for Plaintiff in Error.

This is to certify that I have this date mailed a true and exact copy of the within Petition for Rehearing to Mac Q. Williamson, Attorney General, for Defendant in Error.

Claud Briggs.

Dated this the 31st day of May, 1941.

[File endorsement omitted.]

[fols. 69-70] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed July 8, 1941

Petition for rehearing, denied.

Earl Welch, Chief Justice.

[fol. 71] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

NOTICE OF INTENTION TO APPEAL AND MOTION FOR AN ORDER TO STAY EXECUTION ON THE MANDATE—Filed July 26, 1941

(Leave Granted to File July 26, 1941)

To the Chief Justice of the Supreme Court of State of Oklahoma:

Your petitioner Jack T. Skinner, plaintiff in error herein, hereby gives notice of his intention to appeal to the Supreme Court of the United States from the decision and judgment of this Court herein rendered on the 18th day of February 1941, which decision and judgment had the effect of affirming the judgment of the District Court of Pittsburg County, Oklahoma, appealed from herein and from the further order and judgment of this Court denying Petition

for Rehearing rendered and entered herein the 8th day of July, 1941, for the reason that there is drawn into question the validity of certain statutes of the State of Oklahoma, it being the contention of petitioner, as plaintiff in error, that the said statutes are repugnant to the Constitution and laws of the United States, the decision by this Court being in favor of their validity.

[fol. 72] And petitioner, appellant, in good faith intends to perfect an appeal from the decision and judgment in this cause to the Supreme Court of the United States and requests and moves that this Court enter an order directed to the District Court of Pittsburg County, State of Oklahoma, staying execution on the Mandate for such time as this Court shall direct pending the filing of the appeal to the United States Supreme Court and after this appeal is perfected, during the pendency thereof.

Wherefore, Petitioner, appellant, gives notice of appeal, prays for its allowance and requests and moves that execution of the Mandate be stayed pending the perfection of the appeal and upon perfection thereof during the pendency of the same.

Dated this 25 day of July, 1941.

Claud Briggs, John Morrison, Attorneys for Petitioner, Appellant herein.

Service of a copy of the above and foregoing Notice of Appeal and Motion to Stay Execution on Mandate, is hereby acknowledged to have been made on this 25th day of July, 1941.

Mac Q. Williamson, Attorney General of the State of Oklahoma. Attorney for Defendant in Error, Appellee, by Effie Alexander, Secy.

[fol. 73] IN SUPREME COURT OF OKLAHOMA

28,229

JACK T. SKINNER

v.

STATE OF OKLAHOMA

ORDER STAYING PROCEEDINGS—August 5, 1941

Ordered that all proceedings in trial court on execution of mandate be stayed to October 8th, 1941.

Earl Welch, Chief Justice.

[fol. 74] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

MOTION TO STAY JUDGMENT—Filed November 10, 1941

Comes Now the plaintiff in error and respectfully shows to the Court that heretofore a stay of judgment was granted in the above entitled cause pending an application to the Supreme Court for a writ of certiorari; that said application was not made within ninety days, but on the 8th day of October, 1941, the Honorable Justice of the Supreme Court of the United States, Stanley Reed, granted your plaintiff in error sixty days within which to file his application for writ of certiorari. He, therefore, respectfully prays this Honorable Court to grant a further stay of judgment until the 8th day of December, 1941.

Guy L. Andrews, Attorney for Plaintiff in Error.

Service of the above and foregoing motion acknowledged to have been made upon me this 10th day of November, 1941, and consent is hereby given to the entry of the order.

Mac Q. Williamson, Attorney General.

GLA:VR.

[fols. 75-76] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER STAYING JUDGMENT—Filed November 10, 1941

Now on this 10th day of November, 1941, comes on to be heard the application of the plaintiff in error for a stay of judgment until the 8th day of December, 1941, and the Court having seen said application and considered the same doth grant the relief asked for.

It Is Therefore Considered, Ordered and Adjudged that a stay of judgment be had in the above entitled cause until the 8th day of December, 1941, and if an application for writ of certiorari be filed on or before that date, until determina-

tion of such application by the Supreme Court of the United States.

Earl Welch, Chief Justice.

[fol. 77] IN SUPREME COURT OF OKLAHOMA

STIPULATION OF PARTIES TO THE CONTENTS OF THE RECORD TO BE FILED IN THE UNITED STATES SUPREME COURT AS A PART OF THE APPLICATION OF PETITIONER FOR WRIT OF CERTIORARI—Filed November 10, 1941

Comes Now Jack T. Skinner, by his attorney, Guy L. Andrews, and the State of Oklahoma, by its attorney, Mac Q. Williamson, and stipulate and agree that the contents of the record to be submitted with the Application of the Petitioner for a Writ of Certiorari shall consist of the following records:

1. Petition.
2. Summons, together with the return thereon.
3. Answer and Plea in Bar.
4. General instructions of the Court.
5. Requested instructions of the Court.
6. Oral instructions given at the request of the defendant.
7. Verdict of the jury.
8. Motion for judgment non obstante vere dicto.
9. Motion for new trial.
10. Order overruling motion for new trial.
11. Judgment of the Court.
12. Petition in error filed in the Supreme Court of the State of Oklahoma.
13. Copy of the opinion of the Supreme Court of the State of Oklahoma, and Dissenting Opinion.
14. Petition for rehearing.
15. Order of the Court overruling said petition for rehearing.

[fol. 78] 16. Application for stay of judgment pending proceedings on appeal.

17. Order staying judgment.
18. Application for additional order staying judgment pending proceedings on appeal.
19. Order upon said second application.
20. A copy of this stipulation.
21. Proper certificate of the Clerk relative to it.

It is Stipulated that the evidence in the case may be omitted and that the parties hereto agree that if the law attacked be held valid the evidence is sufficient to support the verdict of the jury and the judgment of the Court.

Done at Oklahoma City, State of Oklahoma, this 10 day of November, 1941.

Guy L. Andrews, Attorney for Jack T. Skinner.
State of Oklahoma, by Mac Q. Williamson, Attorney General of Oklahoma.

[File endorsement omitted.]

[fol. 79] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 80] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

[Title omitted]

ORDER EXTENDING TIME WITHIN WHICH TO APPLY FOR WRIT OF CERTIORARI

On consideration of the motion of counsel for petitioner in the above entitled cause, and good cause therefor having been shown,

It is Now Here Ordered that the time within which petition for writ of certiorari may be filed herein be, and the same is hereby, extended for a period of 60 days from this date.

Stanley Reed, Justice of the Supreme Court of the United States.

Dated this 8th day of October, 1941.

[fol. 81] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 12, 1942

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Roberts took no part in the consideration and decision of this application.

In the Supreme Court

of the United States

OCTOBER TERM, 1941

No. 782

JACK T. SKINNER, *Petitioner,*

VERSUS

STATE OF OKLAHOMA, *EX REL.* MAC Q. WILLIAMSON, ATTORNEY GENERAL.

Petition for Writ of Certiorari and Brief in Support Thereof.

GUY L. ANDREWS,
Attorney for Petitioner.

W. J. Kirkendall,
Of Counsel

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CONSTITUTIONAL PROVISIONS AND STATUTES.

In the Supreme Court of the United States

No. ———
OCTOBER TERM, 1941

JACK T. SKINNER, *Petitioner,*

vs.

STATE OF OKLAHOMA, *EX REL.* MAC Q. WILLIAMSON, ATTORNEY GENERAL.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The Petitioner, Jack T. Skinner, respectfully shows to this Honorable Court;

Summary Statement of the Matter Involved.

A.

That heretofore, to-wit: on the 12th day of July, 1937, he was, by judgment of the District Court of Pittsburg County, Oklahoma, ordered to be rendered sexually sterile (R. 18).

That the proceeding was had by virtue of a certain Act of the Legislature of the State of Oklahoma, appearing in Chapter 26, Article 1, of the Session Laws of said State

for the year 1935. (Harlow's Annotated Supplement, Section 5039 to 5044y.)

That such Act provided generally that any person sentenced to serve a term of imprisonment in a penal institution of the State of Oklahoma who should have been twice, or more times, convicted to final judgment for the commission of crimes amounting to felonies involving moral turpitude, separately brought and tried either in the State of Oklahoma, or in any other State of the United States, and thereafter convicted in the State of Oklahoma for the commission of a crime amounting to moral turpitude and sentenced to serve a term of imprisonment in the Oklahoma State Penitentiary, or the State Reformatory, or any other like penal institution, should be deemed an habitual criminal. (Section 3 of the Act; Section 5044c Harlow's Supplement.)

It further provided that one so adjudged an habitual criminal might, upon trial before any District Court in Oklahoma be ordered to be rendered sexually sterile if a male by performing an operation of vasectomy, and, if a female, an operation of salpingectomy. (Section 4 of the Act; Section 5044d Harlow's Supplement.)

Said Act became effective July 29, 1935.

Your Petitioner was confined in the State Penitentiary at McAlester, Oklahoma, under a sentence imposed on October 15, 1934 (R. 2).

The procedure provided for in the Act permitted a trial by jury to determine (1) whether the defendant proceeded against was an habitual criminal as defined in the Act; and (2) whether the operation could be performed without danger to the general health of such defendant.

The District Court submitted to the jury the second proposition above stated and the jury determined that it could be done without injury to his health (R. 11).

The Act excepted from the definition of "habitual criminal" those violating prohibitory laws, revenue acts, embezzlement, or political offenses. (Section 24a of the Act. Section 5044y Harlow's Annotated Supplement.)

Thereafter, in due course, this Petitioner caused said judgment to be appealed to the Supreme Court of the State of Oklahoma (R. 20), he having, by answer and plea in bar, raised the questions hereinafter set forth as reasons why Petitioner prays this writ.

Thereafter, upon consideration of said Supreme Court, the judgment of the lower court was affirmed in an opinion handed down on the 18th day of February, 1941, in which opinion five judges concurred (R. 24) and four filed their dissenting opinion (R. 34).

Thereafter, in due course, a petition for rehearing was filed by your Petitioner, which petition for rehearing was denied on the 8th day of July, 1941 (R. 39), and such judgment upon such last named date became final so far as concerns the tribunals of the State of Oklahoma.

Notice of intention to appeal to this Honorable Court, and a request for a stay of execution was filed and granted on the 5th day of August, 1941 (R. 40), and such execution was stayed until the 8th day of October following.

Thereafter, an extension of time having been granted by the Honorable Justice Stanley Reed within which this petitioner might file his petition for a Writ of Certiorari, the judgment not having been executed, a further stay of execution was granted until the 8th day of December, 1941 (R. 41).

Reasons Relied on for the Allowance of the Writ.

B.

Your Petitioner prays the Writ of Certiorari because the decision of the Supreme Court of the State of Oklahoma has decided a Federal question of substance adversely to the contentions of this Petitioner in a manner not heretofore determined by this Honorable Court, and not in accord with the applicable decisions of this Honorable Court, in this, to-wit:

I.

That the Supreme Court of the State of Oklahoma erred in holding that the Act of sterilization did not violate the Fourteenth Amendment of the Constitution of the United States that provides in part as follows:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

II.

That the Supreme Court of the State of Oklahoma erred in that it held that under the provisions of such Act of the Legislature of the State of Oklahoma, your Petitioner was not being deprived of his liberty without due process of law, and was twice put in jeopardy for the same offense in violation of Article 5 of the Bill of Rights of the Constitution of the United States.

III.

That the Supreme Court of the State of Oklahoma erred in that it held such Act of the Legislature of the State of Oklahoma was not in violation of Section 10 of Article 1

of the Constitution of the United States that provides in part as follows:

"No state shall * * * pass any bill of attainder * * * ex post facto law or * * *."

IV.

The Supreme Court of the State of Oklahoma erred in that it held that the Legislature of said State could confer upon the District Courts of that State the power to inflict additional punishment for offenses committed outside of the territorial limits of said State.

Wherefore, your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Oklahoma commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the records and all proceedings in the case numbered and entitled Jack T. Skinner, Plaintiff in Error, vs. State of Oklahoma, ex rel. Mac Q. Williamson, Attorney General, Docket No. 28,229; and that the said judgment of the Supreme Court of the State of Oklahoma may be reversed by this Honorable Court.

That your Petitioner have such other and further relief in the premises as to this Honorable Court may seem just and proper; and

Your Petitioner will ever pray.

JACK T. SKINNER,
By GUY L. ANDREWS,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion referred to as supporting the convictions of the petitioner was filed in the Supreme Court of Oklahoma, February 18, 1941 (R. 24). The dissenting opinion was filed the same day (R. 34). Neither opinion is yet in the official reports, but may be found in Pacific Reports (2d), Vol. 115, page 123.

The Statute under consideration was enacted by the Fifteenth Legislature of the State of Oklahoma and appears in the Session Laws of 1935, chapter 26, article 1, page 94, of the official compilation.

In the following discussion wherever portions of the text are capitalized, or italicized, such will be done by us, unless otherwise indicated.

The law enacted, so far as it appeals to us as essential will be copied herein.

The title of the Act, so far as indicates its purposes, reads:

> "An Act to be known and cited as the Oklahoma Habitual Criminal Sterilization Act; providing for and authorizing operations of vasectomy and salpingectomy to be performed upon habitual criminals; defining habitual criminals; conferring jurisdiction upon the District Courts of this State to hear and determine actions instituted and carried on under and pursuant to the provisions thereof; providing and prescribing the pleading and practice and rules of procedure in actions instituted and carried on under and pursuant to the provisions thereof; providing for a person adjudged to be an habitual criminal and upon whom it is adjudged that an operation for vasectomy or salpingectomy be performed to be taken into and held in custody until such operation has been performed. * * *"

The text of the Act, so far as seems to us germane, is as follows:

"BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. Oklahoma Habitual Criminal Sterilization Act.

This Act shall be known and may be cited as the 'Oklahoma Habitual Criminal Sterilization Act.'

Section 2. District Court—Jurisdiction—Procedure.

Jurisdiction is hereby conferred upon and vested in the district courts of the State of Oklahoma to hear and determine all cases arising under and pursuant to the provisions of this Act. And for the trial of such cases, the practice and procedure shall be that now or hereafter provided for in the Code of Civil Procedure of this State, so far as same may be applicable to and not inconsistent with the provisions of this Act.

Section 3. Habitual Criminal Defined.

Where used in this Act and for the purposes of this Act the term 'habitual criminal' refers to and shall mean: a person, male or female, who, having been twice or more times convicted to final judgment for the commission of crimes amounting to felonies involving moral turpitude, separately brought and tried, either in a court of competent jurisdiction of this State or in any other state of the United States, is thereafter convicted to final judgment in a court of competent jurisdiction of this State for the commission of a crime amounting to a felony involving moral turpitude, and sentenced therefor to serve a term of imprisonment in the Oklahoma State Penitentiary, or the Oklahoma State Reformatory, or any other penal institution now or hereafter established and maintained by the State of Oklahoma.

Section 4. Sexual Sterilization.

Any person proceeded against and pursuant to the provisions of this Act and adjudged to be an habitual

criminal as herein defined, shall upon the adjudication thereof becoming final be rendered sexually sterile. And to render such person sexually sterile, if a male, there shall be performed upon him an operation of vasectomy, and if a female, there shall be performed upon her an operation of salpingectomy.

Section 5. County Attorney to Notify Attorney General of Conviction—Duties of Wardens and Officers.

Whenever any person is convicted in a court of competent jurisdiction of this State for the commission of a crime amounting to a felony involving moral turpitude, and is sentenced therefor to serve a term of imprisonment in the Oklahoma State Penitentiary, the Oklahoma State Reformatory, or any other like penal institution now or hereafter established and maintained by the State of Oklahoma, it shall be the duty of the County Attorney of the County in which the conviction is had—if he be in possession of information to the effect or have reason to believe that the person convicted has the status of an habitual criminal as herein defined—to within thirty days from the date said conviction becomes final make in writing and transmit to the Attorney General of this State a statement setting forth therein such information and his reasons for believing said convicted person to have such status.

And, whenever any person, being convicted in a court of competent jurisdiction of this State for the commision of a crime amounting to a felony and being sentenced therefor to serve a term of imprisonment in the Oklahoma State Penitentiary, the Oklahoma State Reformatory, or any other like penal institution now or hereafter established and maintained by the State of Oklahoma, is committed to and received at said penitentiary, reformatory, or other penal institution, to undergo and serve said term of imprisonment, it shall be the duty of the warden or other officer in charge of such prison to forthwith and without unnecessary delay investigate and ascertain from any and all sources available to him whether said convicted person has the

status of an habitual criminal as herein defined; and said warden or other officer in charge of such prison shall forthwith and without unnecessary delay make in writing and transmit to the Attorney General of this State a report of his investigation, setting forth therein such information as he may have tending to show or establish said convicted person to be such an habitual criminal.

Section 6. Attorney General—Duties.

Whenever it shall be brought to the attention of the Attorney General of this State through information furnished him by a County Attorney, or by a warden or other officer in charge of a penal institution, of this State, or through information furnished him from any reliable source, that any person has the status of an habitual criminal as herein defined, said Attorney General shall forthwith and without unnecessary delay investigate with a view to ascertaining whether it may be established by competent proof that such person is such an habitual criminal.

And when and if the Attorney General shall be satisfied that it may be established by competent proof that any person is an habitual criminal as herein defined, he shall forthwith and without unnecessary delay commence a proceeding against such person by filing a petition in the office of the Clerk of the district court of the county in which the person proceeded against may be found and served with summons, and causing a summons for such person to be issued in the proceedings, by the clerk of said court.

Section 7. Petition—Summons.

In proceedings commenced and carried on under and pursuant to the provisions of this Act the State of Oklahoma shall be the plaintiff and the person against whom such proceedings are instituted shall be the defendant.

Petitions filed in such proceedings must contain:

First. The name of the court, and the county in which the proceedings is commenced, and the names of the parties, plaintiff and defendant, followed by the word 'petition'.

Second. A statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition.

Third. A demand of judgment authorizing and ordering the sexual sterilization of the person against whom the proceeding is commenced. * * *"

The remainder of the section deals with service and return of summons.

Section 8 provides for an answer to be in writing and shall be filed within twenty days after the day on which the summons is returnable.

Section 9 provides that the petition and answer shall constitute the only pleading allowed.

Section 10 deals with the continuances.

Section 11 provides for a trial by the court unless a jury is demanded in writing not less than ten days before the day assigned for trial.

The Act then follows:

"*Section 12. Judgment.*

In event the court or jury, as the case may be, find the defendant not to be an habitual criminal, as herein defined, the court shall render judgment denying the plaintiff's petition. But if the court or jury, as the case may be, find the defendant to be such an habitual criminal, and, that said defendant may be rendered sexually sterile without detriment to his or her general health, then and in that event the court shall render judgment to the effect that said defendant be rendered sexually sterile.

In cases wherein judgment is rendered to the effect that a defendant be rendered sexually sterile the court rendering such judgment shall as a part of the judgment, designate and appoint some capable and competent surgeon duly qualified and licensed under the laws of this State to practice surgery, to perform the operation of sterilization ordered and specified in said judgments, and, shall designate and fix the time, which shall not be less than twenty days from the day the judgment is rendered, for such operation to be performed.

Section 13. Execution of Judgment.

Upon judgment being rendered to the effect that a defendant be rendered sexually sterile, the defendant if at large shall by order of the court made and entered in the cause, be committed to the custody of the sheriff of the county in which the cause is pending and be by said sheriff held in the county jail until such time as the operation of sterilization provided for in the judgment is performed. And a copy of said order duly certified by the court clerk shall be sufficient warrant and authority for said sheriff to apprehend, take into custody; and so hold and detain said defendant; Provided, however, that a defendant so taken into custody shall be entitled to be admitted to bail, and the court in making said order shall fix the amount of the bail. Bonds in such cases shall be submitted to the court or judge thereof for approval and shall be conditioned that the defendant will appear and will submit himself or herself, as the case may be, for all purposes provided and specified in the judgment rendered."

Section 14 deals with notice to be given the surgeon and the surgeon's duties in the premises.

Section 15 is as follows:

"*Section 15. Orders in Support of Judgment.*

"The court may at the time of rendering judgment to the effect that a defendant be rendered sexually ster-

ile, make any and all orders and directions designed to be of aid and assistance in carrying out and enforcing any and all provisions of said judgment."

Sections 16, 17 and 18 deal with appeals; Sections 19 and 20 with the surgeon's fees and the payment of claims. Section 21 exempts the surgeon from any liability; 22 and 23 have to do with the routine procedure; 24 with the construction of the Act and 24A reads as follows:

"*Section 24A. Offenses Excepted From Act.*

"Provided, that offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act.

"Approved May 14, 1935."

The record in the instant case discloses a filing of a petition against Jack T. Skinner by the Attorney General in the District Court of Pittsburg County, Oklahoma, on the 12th day of June, 1936. The essential portions of the petition were:

"That the said Jack T. Skinner is an habitual criminal, having been convicted three times to final judgment for the commission of crimes amounting to felony and involving moral turpitude. Said cases being separately brought and tried in courts of competent jurisdiction of the State of Oklahoma; and the said defendant being sentenced therefor to serve terms of imprisonment in the Oklahoma State Reformatory and the Oklahoma State Penitentiary; and that said defendant is now confined in the Oklahoma State Penitentiary; at McAlester, Oklahoma; and the said defendant has been convicted in the following cases, to-wit: * * *"

It then alleges him to have been sentenced to serve a term of eleven months in the Oklahoma State Reformatory

at Granite, Oklahoma, for the crime of stealing chickens in the year 1926; that in 1929 he was convicted for the crime of robbery with fire arms; that in 1934 he was convicted of the crime of robbery with fire arms.

The petition further alleges that the operation of vasectomy could be performed without injury to his general health; and closes with a prayer for such an order (R. 1).

The defendant appeared specially and alleged that involuntarily and under compulsion he filed his plea and answer.

His first substantial plea was in fact a demurrer to the petition, though embodied in the answer. He then plead generally the unconstitutionality of the Act, bottoming such plea on the Constitution of the State of Oklahoma and the Constitution and Laws of the United States of America.

In Section 3 he plead that as to the offenses alleged in sub-paragraph A and B of the State's petition he had paid the full penalty under the laws in existence at the time the offenses were committed, and the conviction had; that the date of his last conviction (October 15, 1934) was prior to the passage of the Act under consideration and plead that the Act would have no application to him; that the imposition of sentence under the Habitual Criminal Act would be subjecting him to double jeopardy.

Petitioner further pleads that the Act is void under the Fifth Amendment of the Constitution of the United States; that the Act is violative of article 8, known as the Eighth Amendment of the Constitution of the United States. That the Act is violative of what is usually known as the "Due process of Law" provision of the Constitution of the United States; and that it deprived him of equal protection of the laws; that while a jury might be demanded under the

terms of the Act the matters left to the discretion of the jury were so limited as to amount to an arbitrary denial of his rights, and an arbitrary imposition of additional punishment and penalty without due process of law (R. 4).

The court instructed the jury in part as follows:

"6.

The Court instructs you that under the laws and the evidence herein the defendant herein is an habitual criminal (R. 11).

7.

The only issue for your consideration in this case is whether or not the operation and the effects thereof of vasectomy will be detrimental to the defendant's general health." (R. 11.)

The court then submitted to the jury the following interrogatory:

"Interrogatory

"Do you find that the defendant may be sexually sterile by an operation of vasectomy to be performed upon him without detriment to his general health?"

The blank in this interrogatory was filled in with the word: "Yes", and signed: "J. J. Brewen, Foreman" (R. 14).

Motion for new trial was filed as provided by Oklahoma procedure (R. 15). This was overruled and exceptions saved by the defendant and judgment was entered in accordance with the finding of the jury upon the interrogatory (R. 17).

In due time the petitioner here, as plaintiff in error, filed his appeal in the Supreme Court of the State of Oklahoma (R. 20) and, thereafter, on the 18th day of February, 1941, by a divided court the judgment of the lower court was affirmed (R. 24).

Petition for rehearing was filed (R. 37); which petition was on the 8th day of July, 1941, by the Court denied. The stay of execution was granted on the 5th day of August, 1941 (R. 40), effective until the 8th day of October, 1941.

Thereafter, on the 8th day of October, by virtue of an order of the Justice Stanley REED, time within which to file petition for Writ of Certiorari was extended for sixty days and further stay of execution was granted by the Supreme Court of the State of Oklahoma, to be effective until the 8th day of December, 1941 (R. 43).

In analyzing the act under consideration we are impressed by its turgid inflexibility and the seemingly callous disregard of any humanitarian consideration usually appertaining to such act.

We are aware of, and sympathize with, the legislation that in fact tends to protect the public without inflicting useless wrong upon the individual.

We would have but little fault to find with the Indiana statute providing for sterility "where it is probable that the children of inmates will inherit a tendency to criminality, insanity, feeble mindedness, idiocy or imbecility"; or, even the Statute of California that provides that the operation shall not be performed unless one had been committed twice for some sexual offense, or unless three times for other crimes and *gives evidence of being a moral and sexual pervert.*

—California Statutes 1909, chapter 720.

The State of Washington prescribes it as a punishment for rape and habitual criminality to be imposed by the court in its discretion with other punishments.

—Rem. & Bal. Code, Sec. 2287.

Nor is it kin to the Statute considered by this Honorable Court in *Carrie Buck* v. *J. H. Bell*, 272 U. S. 200, 71 L. ed. 1000.

In that case an Act of Virginia, of March 30, 1924, provided for the sterilization of patients afflicted with hereditary forms of insanity, imbecility, etc.

In these statutes it presupposes intelligent and scientific inquiry for the purpose of determining whether or not a person upon whom it was sought to perform the operation causing sterility would in fact transmit to off-spring mental or physical characteristics imposing unnecessary burdens or dangers upon others.

We find nothing remotely resembling these beneficent features inherent in the Oklahoma Habitual Criminal Act.

It erects an arbitrary numerical standard and with this as a measuring stick determines CONCLUSIVELY the existence of another fact. That is, that offspring of him, or her, who has been thrice convicted, will inherit criminal tendencies, if it is an eugenic measure.

Not only this, but under the terms of Section 6 of the Act, whenever it is brought to the attention of the Attorney General through information by a duly constituted authority, or *information furnished him from any other reliable source that any person has the status of an habitual criminal* as determined by the numerical standard, it becomes his duty to reach back through whatever period of time necessary, investigate and find the facts. If when measured by the numerical standard, a culprit is found, the victim is deprived of his manhood. No statute of limitation hampers him.

Section 13 has provided that the defendant may be placed in jail; that he is unwillingly being subjected to this

mutilation is a matter of course; that resistance might be physically offered by the person complained against was contemplated; that restraint, possibly serious or extensive, might be necessary was in contemplation of the parties who prepared the bill. Therefore, orders are to be made by the court rendering the judgment and enforced by officers charged with carrying the judgment into effect, just as any other sentence imposed upon any other prisoner confined in the jail would be enforced; by whatever force is necessary. (Sec. 15 of Act.)

The stark potentialities of the Oklahoma enactment, we respectfully submit, are not found in the mandates of any other act heretofore upheld by courts of last resort.

In the following we will group the first and second contentions presented in the petition for Writ of Certiorari; that is: The Act is violative of the Fourteenth Amendment of the Constitution of the United States which provides that no person shall be deprived of "life, liberty or property without due process of law" and that no person be denied "equal protection to the laws"; and, second, that the prohibition in Article 5 of the Bill of Rights against double jeopardy is violated by the Act.

It seems to be admitted that this act can be sustained only upon the theory that it is an eugenic measure. We have difficulty in finding any indicia indicating this intent on the part of the Legislature.

An information is filed against the defendant alleging, as we have before noted, the existence of the fact of three felonious *convictions*, without regard to the nature of the crime. If a boy in his youth had stolen a chicken and later had made away with his neighbor's bird dog, worth more than twenty dollars ($20.00) and were separately convicted

for these offenses, on his release had pursued the tenor of his way without crime, or criminal indicia, till his old age, when hungry he had entered a house and taken a loaf of bread—for which he was again convicted—he would have done all those things necessary to brand him as an habitual criminal. Even though he was more than eighty years of age when the last offense was committed, and he had not felt a sexual impulse for ten years, the minions of the law under this statute would search out the ducts through which, in the long ago, the vitalizing secretions had been wont to pass and sever it, under the pretense of rendering him sterile.

When he had been informed against he was restricted by the statute to an answer equivalent to a criminal plea of "not guilty", unless we count the plea in avoidance (that is, his physical condition would not permit the operation) as another defense. The fact of other convictions is proof positive and incontrovertible. He is an habitual criminal—He *has* physical faculties sufficient to perform the functions of procreation—that the nerve and brain and blood are so vitiated that he will transmit the criminal instinct to the babe to be born!

Of course, it is conceded that the Legislature may lawfully provide that one fact when proven may be prima facie evidence of another fact; but, certainly, there must be some rational connection between them. It can't reach out into the realm of fanciful conjecture.

If it were an eugenic measure would we not expect to find within its terms some of the humanitarian provisions that mark legislation having such design.

The title of the Act gives us no indication that it was intended for eugenic purposes.

Is there any reason why the defendant should not be allowed to show that in fact such mutilation would be futile; that he couldn't exercise the power of procreation any more before than after the operation, if such were the fact; if public safety, health or morals were the sole objective embodied in the act?

Should he not be allowed to show that perchance his former convictions had been forgiven him by the jurisdiction where the judgment was rendered because it had been learned that he had been wrongfully convicted; or that the former offenses had been committed through sudden impulses of anger, or like overwhelming emotions? That his background, that his family history, that all other things surrounding him, belied the idea that he had inherited criminal instincts, or that he was inevitably bound to transmit them?

The Supreme Court of Oklahoma based its decision very largely upon its own pronouncements: *In re: Main,* 162 Okl. 65.

The statute the Court had under consideration there was so vitally different from this that it is hard to see how one can be thought to support the other.

The statute supporting the judgment in the *Main* case provided (Okla. Stat. '31, Sec. 5039, *et seq.*) that:

> "*5039. Insane Patients—Sexual Sterilization Before Discharge.*
>
> "That whenever the Superintendent of the Hospital for the Insane at Norman, Oklahoma, or of the Hospital at Supply, Oklahoma, or of the Hospital for the Insane at Vinita, Oklahoma, or the Institute for Feeble Minded at Enid, Oklahoma, or of any other such institution supported in whole or in part from public funds shall be of the opinion that it is for the best in-

terest of the patients hereinafter mentioned, and of society, that any male patient under the age of 65 years, or any female under the age of 47 years, and which patients are about to be discharged from said institution, should be sexually sterilized, such superintendent is hereby authorized to perform or cause to be performed by some capable physician or surgeon the operation of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeblemindedness, or epilepsy; provided that such superintendent shall have first complied with the requirements of this act."

The succeeding section required that the superintendent present to the Board of Affairs a petition stating the facts of the case to be considered and the ground for his opinion that the interest of society and of the patient will be best served by the operation. This petition is served upon the patient, her guardian is provided for and is allowed compensation for his services. A hearing is had before a board authorized to act "that may receive and consider as evidence at said hearing the commitment papers and other records of said patient, with or in any of the aforesaid named institutions, as certified by the superintendent, *together with such other legal evidence as may be offered by any party to the proceedings.*"

The board is authorized to deny the prayer of the petitioner or, if it shall find that the patient is "insane, idiotic, imbecilic, feebleminded or epileptic and by *the laws of heredity is the probable potential parent of socially inadequate offspring likewise afflicted* • • •" and that the operation can be done without detriment to the health, an order may be entered directing it. There is regard had for the age of those concerned; there must be a judicial finding that the

patient is in fact possessed of injurious characteristics that may be transmitted. Any available evidence upon this subject is heard and considered. The mouth of the defendant is not closed by happenings that may be disjointed, long removed from each other, no one of which may have sprung from any cause contributing to any other one.

EVERY SAFEGUARD IS OFFERED TO THE DEFENDANT. It is far removed from the statute now being considered with its numerical yardstick creating, not prima facie proof, but conclusive proof of the existence of the facts necessary to convict the defendant.

To constitute due process of law there must be conformity to established and fundamental rules controlling the competency of the evidence.

The Legislature may not enact rules of evidence which are arbitrary and unreasonable and establish conclusive presumptions so as to deprive the accused of a reasonable opportunity to submit all facts bearing on the issues.

In the case of *Manley* v. *State of Georgia*, 272 U. S. 1, 73 L. ed. 575, this Honorable Court had under consideration the statute of the State of Georgia declaring:

> "Every insolvency of a bank shall be deemed fraudulent and the president and the directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally, with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner."

After a conviction Manley appealed to this Honorable Court. The first, second and third syllabi of the reversing opinion are as follows:

> *"Constitutional law, 830, due process—statutory presumption—validity.*
>
> "1. State legislation that proof of one fact, or group of facts, shall constitute prima facie evidence of the main or ultimate fact in issue, does not constitute a denial of due process of law if there is a rational connection between what is proof and what is to be inferred, and the presumption is not unreasonable, and is not made conclusive of the rights of the person against whom it is raised.
>
> *"Constitutional law, 829—arbitrary presumption —invalidity.*
>
> "2. A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the 14th Amendment to the Federal Constitution.
>
> *"Constitutional law, 827—legislative fiat—sufficiency.*
>
> "3. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property."

The opinion cites:

> *Mobile J. & K. Cr. Co.* v. *Turnip Seed*, 219 U. S. 35;
> *Bailey* v. *Ala.*, 219 U. S. 219;
> *McFarland* v. *Amer. Sugar Ref. Co.*, 249 U. S. 79.

It makes but litle difference under what classification the Act may be catalogued so far as concerns the petitioner's rights under this provision. As was said by this Honorable Court in *Meyer* v. *Nebraska*, 262 U. S. 390, 67 L. ed. 1042, at pages 1449-50:

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen."

This text is supported by a multitude of citations.

Not only does it violate the Fourteenth Amendment but we respectfully urge that it deprives this petitioner of equal protection of the law.

May we not further suggest the unreasonable classification found in the law.

Section 24A of the Act decrees:

"That offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement and political offenses shall not come or be considered within the terms of this act."

I have wondered upon what rational basis the Legislature could have arrived at the conclusion that all those committing minor offenses would transmit to their progeny only vices; while the dishonest financier who appropriates trusting depositors' monies in the banks, or trustees who convert funds of confiding clients, and the saboteur, and the inciter of treason could spew from his loin's only progeny blessed with virtues.

The terms of the Act exclude from its penalties the Capones, the Ponzis and the Benedict Arnolds. Is it pos-

sible that evasion of the revenue laws is so indicative of honesty and virtue that the Legislature can protect them in their social and family functions while the less versatile criminal is unsexed, without violating the equal protection clause of our Federal Constitution?

We respectfully suggest that it is arbitrary, illogical and utterly unrelated to any possible intent of enacting eugenic legislation.

The third (III) contention of the petitioner is that the Act violates section 10 of article 1, of the Federal Constitution prohibiting the states from passing any bill of attainder, or *ex post facto* law.

The answer to this question depends solely upon whether Your Honors conceive the legislation to be penal or eugenic and within the police powers of the State. If the latter, of course, this contention cannot possibly be upheld. If the former, equally, of course, it cannot be denied.

We conceive it to be penal because the Act requires the doing of things that can only mean punishment. If not penal, why the provision for imprisonment and bond? If not penal, why inflict it upon him whose habitat is the death cell? If not penal, why compel its performance upon the man who has been lacking in sexual impulses, or procreative powers, for more years than he likes to remember? Why force it upon the woman whom years and the process of nature has made barren?

It is surely not within the purview of the State's powers to mutilate human bodies by an act that is sadistic and futile but justified by declaring an eugenic intent.

For these reasons we respectfully urge that Section 10, of article 1, above mentioned forbids it.

Again the petitioner urges that it was not within the sphere of the Legislature of the State of Oklahoma to confer upon its District Courts the power to inflict additional punishment for offenses committed beyond its territorial limits. It is fundamental that the legislature may enact laws to punish crimes committed and protect persons and property, within its boundaries.

It is equally fundamental that these laws can have no extra territorial effect. When considered from this view point, in connection with the contentions of the State, the law is peculiar.

Applying the numerical yardstick, there must be three convictions had previously—it makes no difference where, except that the last one must be in the State of Oklahoma. There must be three separate trials. It wouldn't do that there be three convictions upon separate counts in the same indictment. It would seem, under this condition that this defendant could not transmit undesirable characteristics to his offsprings. But, if he should be tried separately three times, at the same term of court and three times convicted, he would inevitably transmit his degenerate tendencies and he would fall under the provisions of the Act; provided, of course, that the crimes did not include embezzlement, treason, or other exception. If, however, he is convicted once in Kentucky, a second time in Oklahoma, and a third time in Tennessee, he is not subjected to the sterilization proceeding—he can't transmit apparently unless the third offense is committed in the State of Oklahoma.

Of course the terms of the Act wholly exclude the territories of the United States and its insular possessions—why, we can't conceive.

Is it not patent under these circumstances that the defendant is being subjected to penalties not because of any Act within the jurisdiction of the Courts of Oklahoma but it is a penalty that could not be added without increasing the punishment that the courts of another state thought sufficient when measured by the offense judicially considered.

One other observation and we are through. In the practical enforcement of this Act if it be upheld the enforcement will become largely a matter of mechanical routine.

If it is civil, the attorney general can have his complaints printed and fill the blanks, cause summons to be issued and the notice given as by the statute provided.

The prisoner has only the resources of civil procedure available to him. It is well known that ninety-nine out of a hundred confined there are without pecuniary resources. He couldn't employ a lawyer, and being a civil action, the court couldn't appoint one for him, he has no means of procuring witnesses, if he could reach a physician who would be willing to make an examination of his physical and nervous condition and testify for him, in ninety-nine cases out of a hundred, he couldn't pay him. He will be as helpless as a hand-cuffed beggar. On the appointed day, by armed guards, he will be escorted to the courtroom, a prison physician will, no doubt sincerely, testify that in his judgment the operation can be performed without physical injury. A judgment will be rendered and the work will be done, by force, if necessary, and the prisoner returned to his cell. This of course is not sufficient to invalidate the Act. It is suggested as a reason why doubt should be resolved in behalf of the petitioner.

We believe this case is one calling for the exercise by this Honorable Court of its supervisory powers; that a writ of certiorari should issue; and finally that the judgment of the Supreme Court of the State of Oklahoma be reversed.

These conditions, we respectfully urge, merit the consideration of the Court: not because of any virtue within the petitioner, but because of the duty of our sovereignty to guard against an unwarranted use of its powers.

All of which is respectfully submitted.

GUY L. ANDREWS,
Counsel for Petitioner.

In the

Supreme Court of the United States

Number 782—March Term 1942.

JACK T. SKINNER, *Petitioner,*

VERSUS

STATE OF OKLAHOMA, *EX REL.* MAC Q. WILLIAMSON, ATTORNEY GENERAL.

BRIEF OF PETITIONER.

GUY L. ANDREWS,
H. I. ASTON,
McAlester, Oklahoma,
Attorneys for Petitioner.

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BRIEF OF PETITIONER.

Statement of Case.

MAY IT PLEASE THE COURT:

Your Petitioner respectfully shows that heretofore, on the 12th day of July, 1937, he was ordered by judgment of the District Court of Pittsburg County, Oklahoma, to be rendered sexually sterile (R. 18). The proceeding was had by virtue of a certain act of the Leislature of the State of Oklahoma, appearing in Chapter 26, Article 1, of the Session Laws of the State of Oklahoma (Oklahoma Statutes 1941, Title 57, Sections 171-195) (Pet. 6-12). . .

The Act provides generally that persons sentenced to serve a term in the penal institutions in the State of Oklahoma who had been twice, or more times, convicted prior thereto for the commission of felonies involving moral turpitude should be termed habitual criminals (Sec. 3 of the Act); further, that one so adjudged an habitual criminal might upon trial before the District Courts of Oklahoma be ordered to be rendered sexually sterile by an operation of

vasectomy upon a male, and salpingectomy upon a female (Sec. 4 of the Act).

The Petitioner was confined to the State Penitentiary under a sentence imposed upon October 15, 1934 (R. 2).

The proceedings provided called for a trial by jury to determine *(1)* whether the defendant was an habitual criminal as defined by the act, and *(2)* whether the operation could be performed without injury to the health of such defendant.

The Act excepted from the definition of "habitual criminals" those violating prohibition laws, revenue acts, embezzlement, or political offenses.

Upon trial the court submitted to the jury but one question; that is, whether the operation could be performed without injury to the health of the defendant. The jury determined that it could be done (R. 11).

The case was appealed to the Supreme Court of the State of Oklahoma (R. 20), he having by answer and plea in bar raised in the trial court the defenses appearing in the application for writ of certiorari filed herein.

Upon consideration of the appeal the judgment of the lower court was affirmed on the 18th day of February, 1941, by an opinion of five judges of the Court (R. 24) to which affirmance four judges dissented (R. 34).

(These opinions have not yet been officially reported but may be found in 115 P. (2d) 123, *et scq.)*

In due course a petition for rehearing was filed and thereafter denied on the 8th day of July, 1941 (R. 39).

An appeal was perfected to Your Honors' court by record filed herein, on December 4, 1941, your Docket Number 782.

ARGUMENT *and* CITATION *of* AUTHORITIES.

There is a certain embarrassment encompassing counsel for Petitioner in the preparation of this brief, in that it will necessarily involve repetition of certain suggestions appearing in the brief filed in support of the petition for writ of certiorari. We hope for a kindly appreciation of these conditions at your hands.

As hereinbefore suggested, the Act became a part of the Laws of the State of Oklahoma by virtue of an act of the Legislature of 1935. The portions of this act we deem essential are:

> "An Act to be known and cited as the Oklahoma Habitual Criminal Sterilization Act; providing for and authorizing operations of vasectomy and salpingectomy to be performed upon habitual criminals; defining habitual criminals; conferring jurisdiction upon the District Courts of this State to hear and determine actions instituted and carried on under and pursuant to the provisions thereof; providing and prescribing the pleading and practice and rules of procedure in actions instituted and carried on under and pursuant to the provisions thereof; providing for a person adjudged to be an habitual criminal and upon whom it is adjudged that an operation for vasectomy or salpingectomy be performed to be taken into and held in custody until such operation has been performed. * * *"

The text of the Act, so far as seems to us germane, is as follows:

"BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

"Section 1. *Oklahoma Habitual Criminal Sterilization Act.*

"This Act shall be known and may be cited as the 'Oklahoma Habitual Criminal Sterilization Act.'

"Section 2. *District Court—Jurisdiction—Procedure.*

"Jurisdiction is hereby conferred upon and vested in the district courts of the State of Oklahoma to hear and determine all cases arising under and pursuant to the provisions of this act. And for the trial of such cases, the practice and procedure shall be that now or hereafter provided for in the Code of Civil Procedure of this State, so far as may be applicable to and not inconsistent with the provisions of this Act.

"Section 3. *Habitual Criminal Defined.*

"Where used in this Act and for the purposes of this Act the term *'habitual criminal'* refers to and shall mean: a person, male or female, who, having been twice or more times convicted to final judgment for the commission of crimes amounting to felonies involving moral turpitude, separately brought and tried, either in a court of competent jurisdiction of this State or in any other state of the United States, is thereafter convicted to final judgment in a court of competent jurisdiction of this State for the commission of a crime amounting to a felony involving moral turpitude, and sentenced therefor to serve a term of imprisonment in the Oklahoma State Penitentiary, or the Oklahoma State Reformatory, or any other penal institution now or hereafter established and maintained by the State of Oklahoma.

"Section 4. *Sexual Sterilization.*

"Any person proceeded against and pursuant to the provisions of this Act and adjudged to be an habitual criminal as herein defined, shall upon the adjudication thereof becoming final be rendered sexually sterile. And to render such person sexually sterile, if a male, there shall be performed upon him an operation of vasectomy, and if a female, there shall be performed upon her an operation of salpingectomy.

"Section 5. *County Attorney to Notify Attorney General of Conviction—Duties of Wardens and Officers.*

"Whenever any person is convicted in a court of competent jurisdiction of this State for the commission of a crime amounting to a felony involving moral turpitude, and is sentenced therefor to serve a term of imprisonment in the Oklahoma State Penitentiary, the Oklahoma State Reformatory, or any other like penal institution now or hereafter established and maintained by the State of Oklahoma, it shall be the duty of the County Attorney of the County in which the conviction is had—if he be in possession of information to the effect or have reason to believe that the person convicted has the status of an habitual criminal as herein defined—to within thirty days from the date said conviction becomes final make in writing and transmit to the Attorney General of this State a statement setting forth therein such information and his reasons for believing said convicted person to have such status.

"And, whenever any person, being convicted in a court of competent jurisdiction of this State for the commission of a crime amounting to a felony and being sentenced therefor to serve a term of imprisonment in the Oklahoma State Penitentiary, the Oklahoma State Reformatory, or any other like penal institution now or hereafter established and maintained by the State of Oklahoma, is committed to and received at said penitentiary, reformatory, or other penal institution, to undergo and serve said term of imprisonment, it shall be the duty of the warden or other officer in charge of such prison to forthwith and without unnecessary delay investigate and ascertain from any and all sources available to him whether said convicted person has the status of an habitual criminal as herein defined; and said warden or other officer in charge of such prison shall forthwith and without unnecessary delay make in writing and transmit to the Attorney General of this State a report of his investigation, setting forth there-

in such information as he may have tending to show or establish said convicted person to be such an habitual criminal.

"Section 6. *Attorney General—Duties.*

"Whenever it shall be brought to the attention of the Attorney General of this State through information furnished him by a County Attorney, or by a warden or other officer in charge of a penal institution, of this State, or *through information furnished him from any reliable source, that any person has the status of an habitual criminal as herein defined,* said Attorney General shall forthwith and without unnecessary delay investigate with a view to ascertaining whether it may be established by competent proof that such person is such an habitual criminal.

"And when and if the Attorney General shall be satisfied that it may be established by competent proof that any person is an habitual criminal as herein defined, he shall forthwith and without unnecessary delay commence a proceeding against such person by filing a petition in the office of the Clerk of the district court of the county in which the person proceeded against may be found and served with summons, and causing a summons for such person to be issued in the proceedings, by the clerk of said court.

"Section 7. *Petition—Summons.*

"In proceedings commenced and carried on under and pursuant to the provisions of this Act the State of Oklahoma shall be the plaintiff and the person against whom such proceedings are instituted shall be the defendant.

"Petitions filed in such proceedings must contain:

"*First.* The name of the court, and the county in which the proceedings is commenced, and the names of the parties, plaintiff and defendant, followed by the word 'petition'.

"*Second.* A statement of the facts constituting the

cause of action, in ordinary and concise language, and without repetition.

"*Third.* A demand of judgment authorizing and ordering the sexual sterilization of the person against whom the proceeding is commenced. * * * "

The remainder of the s ction deals with service and return of summons.

Section 8 provides for an answer to be in writing and shall be filed within twenty days after the day on which the summons is returnable.

Section 9 provides that the petition and answer shall constitute the only pleading allowed.

Section 10 deals with the continuances.

Section 11 provides for a trial by the court unless a jury is demanded in writing not less than ten days before the day assigned for trial.

The Act then follows:

"Section 12. *Judgment.*

"In event the court or jury, as the case may be, find the defendant not to be an habitual criminal, as herein defined, the court shall render judgment denying the plaintiff's petition. But if the court or jury, as the case may be, find the defendant to be such an habitual criminal, and, that said defendant may be rendered sexually sterile without detriment to his or her general health, then and in that event the court shall render judgment to the effect that said defendant be rendered sexually sterile.

"In cases wherein judgment is rendered to the effect that a defendant be rendered sexually sterile the court rendering such judgment shall as a part of the judgment, designate and appoint some capable and competent surgeon duly qualified and licensed under the laws of this State to practice surgery, to perform

the operation of sterilization ordered and specified in said judgments, and, shall designate and fix the time, which shall not be less than twenty days from the day the judgment is rendered, for such operation to be performed.

"Section 13. *Execution of Judgment.*

"Upon judgment being rendered to the effect that a defendant be rendered sexually sterile, the defendant if at large shall by order of the court made and entered in the cause, be committed to the custody of the sheriff of the county in which the cause is pending and be by said sheriff held in the county jail until such time as the operation of sterilization provided for in the judgment is performed. And a copy of said order duly certified by the court clerk shall be sufficient warrant and authority for said sheriff to apprehend, take into custody, and so hold and detain said defendant; Provided, however, that a defendant so taken into custody shall be entitled to be admitted to bail, and the court in making said order shall fix the amount of the bail. Bonds in such cases shall be submitted to the court or judge thereof for approval and shall be conditioned that the defendant will appear and will submit himself or herself, as the case may be, for all purposes provided and specified in the judgment rendered."

Section 14 deals with notice to be given the surgeon and the surgeon's duties in the premises.

Section 15 is as follows:

"Section 15. *Orders in Support of Judgment.*

"The court may at the time of rendering judgment to the effect that a defendant be rendered sexually sterile, make any and all orders and directions designed to be of aid and assistance in carrying out and enforcing any and all provisions of said judgment."

Sections 16, 17 and 18 deal with appeals; Sections 19 and 20 with the surgeon's fees and the payment of claims. Section 21 exempts the surgeon from any liability; 22 and 23 have to do with the routine procedure; 24 with the construction of the Act and 24A reads as follows:

"Section 24A. *Offenses Excepted From Act.*

"Provided, that offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act.

"Approved May 14, 1935."

An analysis of the Act indicates that the Legislature, by Section 3, divided criminals into two classes—the habitual and non-habitual criminals; that this classification depended upon a numerical factor in that those having been *three* times convicted of crimes involving moral turpitude, *after three separate* trials were deemed habitual. Had they been convicted of a greater number of offenses by virtue of indictments charging more than one offense with shall we say, two separate trials, they would not be habitual criminals.

Those convicted of violations of prohibitory laws, revenue acts, embezzlement, or political offenses were excluded from the definition of habitual criminals—it would make no difference how great the number of their convictions.

The reason given by the majority opinion of the State Supreme Court was based upon the following excerpt of its opinion (R. 31).

"We must, therefore, assume that the Legislature had before it statistics, scientific works, and information from which it found as a fact that habitual criminals are more likely than not to beget children of like criminal tendencies who will probably become a burden upon society. 6 R. C. L. 111; 11 Am. Jur. 820. Based

upon such a presumptive finding of fact, the legislation was enacted. * * *"

It is hard for us to determine why the classification may not be deemed arbitrary.

It, of course, could not be presumed that the Legislature intended either to establish an aristocracy of crime, relieving favored ones of the burdens borne by those less fortunate—since the measure was purely eugenic, if the State's contentions be upheld. The exception must have been for some, to us, obscure reason, hidden in the hygenic formulae.

It could not possibly be because criminals of this class are lacking in procreative capacity. The public prints have acquainted us with the fact that over-lords of vice in the prohibition days were frequently fathers. It hasn't been long since Capone's son was married.

It is hard to conceive of any peculiar physical immunization appertaining to this ilk that would prevent them from transmitting their criminal characteristics, if the less notable birds of prey transmit their "criminal tendencies", as suggested in the majority opinion.

In attempting to sustain the Legislature the Supreme Court of Oklahoma says (R. 29) (Italics ours):

> "Defendant argues that the failure to provide a hearing on the question of whether he will likely beget criminal children shows that the Legislature had no eugenic purpose in mind. But that does not negative a eugenic intention, because the omission of such a finding *simply shows that the Legislature was satisfied that criminal tendencies in all such persons are inheritable.* * * *"

Since we must be sure the measure was actuated by no desire to unduly favor the bootlegger, the traitor, or es-

pecially the embezzler, whose pathway is too often marked by the broken lives and fortunes of victims who trusted him, then in order to relieve the Act of the charge of arbitrary classification we must find that this class of criminals are not likely "to beget children of like criminal tendencies who will probably become a burden upon society."

We respectfully urge that this asks more than any logical concept of the problem can justify.

Conceding it was an attempt to in some measure "preserve public health, morals, safety, and welfare", why should the retroactive effect of the legislation be made to apply only to those convicted at least once in Oklahoma? Would not the three convictions in another state be just as likely to produce the deplorable result? Why not in one comprehensive swoop embrace all of those who have anywhere, or at any time, heard the three sentences pronounced upon them for "crimes involving moral turpitude"? Remember, it is sustained purely upon the basis of "eugenics" —a rather vague and indefinite term. So far as we have been able to find, the courts have never defined or limited it.

The Petitioner complains:

I.

Because the Supreme Court of the State of Oklahoma erred in holding that the Act did not violate the Fourteenth Amendment of the Constitution of the United States providing in part as follows:

> "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (Petition in error.)

Due process of law as interpreted by this Honorable Court means more than a mechanical observance of the hollow formulae of process.

The objection urged goes to the substantive character of due process, and challenges the State's declaration of its police power.

As long ago as *Davidson* v. *New Orleans*, 96 U. S. 97, Mr. Justice MILLER caused the Court to say:

> "* * * But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'No state shall deprive any person of life, liberty, or property without due process of law,' can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is affected under the forms of state legislation. * * *"

This was cited with approval and added to in *Hagar* v. *Reclamation District*, 111 U. S. 701, when Mr. Justice FIELDS said:

> "It is sufficient to observe here, that by 'due process' is meant one which, following the form of law, is appropriate to the case and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. *Hurtado* v. *California* (*Ante*, 232). * * *"

The statute under consideration is not akin, unless perhaps in the judicial declaration of its purposes, to any statute upon a similar subject that has come to our notice.

The statutes that have been considered have, without exception, been declared invalid when the act did not provide for hearing; and not infrequently because of the equal protection of the law provision of the Constitution had been contravened.

Such a statute was considered in *Davis* v. *Berry*, 216 Fed. 413, arising under the laws of Iowa and authorizing the sterilization of idiots, feebleminded, drunkards, drug fiends, epileptics, syphilitics, and moral and sexual perverts, and was mandatory as to criminals twice convicted of felonies. The court held the act violated the constitutional provisions against cruel and unusual punishment. Further, the failure of the statute to advise victim of the proceedings until he or she was ordered to submit, was contrary to the due process provision of the law. The court said:

> "One of the rights of every man of sound mind is to enter into the marriage relation. Such is one of his civil rights, and deprivation or suspension of any civil right for past conduct is punishment for such conduct, and this fulfills the definition of a bill of attainder, because a bill of attainder is a legislative act which inflicts punishment without a jury trial."

The case is interesting in that there is a discussion of some of the phases of similar provisions in ancient laws.

In *Smith* v. *Board of Examiners*, 88 Atl. 963, a statute was considered which provided for sterilization of epileptics confined in charitable institutions. It was voided because of the Fourteenth Amendment of the Federal Constitution.

In *Osborne* v. *Thompson*, 169 N. Y. Supp. 638 the court held unconstitutional a statute similar to the New Jersey statute just mentioned because of a denial of equal protection of the law, and because not within the proper exercise of police power. The case was later affirmed in 171 N. Y. Supp. 1094.

In *Williams* v. *Smith* (190 Ind. 526), 131 N. E. 2, the statute was held invalid. The court saying (51 A. L. R. 863):

> "In the instant case the prisoner has no opportunity to cross examine the expert to decide that this operation shall be performed upon him. He has no chance to bring experts to show that it should not be performed; nor has he a chance to controvert the scientific question that he is of a class designated in the statute. And, wholly aside from the proposition of cruel and unusual punishment, and infliction of pains and penalties by the legislative body through an administrative board, it is very plain that this act is in violation of the 14th Amendment to the Federal Constitution in that it denied appellee due process. * * * The trial court was correct in enjoining appellant from performing or causing to be performed, the operation of vasectomy upon appellee."

No statute that we have ever found has ever been upheld unless the state was required to show, at least by preponderance of the evidence, that the condition complained of was one that could be transmitted and that respondent was capable of procreation.

That was true in the case sustained by this Court, *Buck* v. *Bell*, 272 U. S. 200, 71 L. ed. 1000.

The statute there provided for an intelligent and scientific inquiry to determine whether or not the defendant could in fact transmit to offspring mental or physical characteristics imposing unnecessary burdens upon society.

The case of *In re: Main*, 162 Okl. 65, largely relied on in the majority opinion provides (Oklahoma Statutes 1941, Title 35, Secions 141, *et seq.)* that whenever the superintendent of the hospital for the insane at (naming all points in the State of Oklahoma where located), or any other such institution supported in whole, or in part, from public funds, shall be of the opinion that it is to the best interest of the *patient mentioned* and *of society* that any male patient under the age of sixty-five, or female person under the age of forty-seven, and which are *about to be discharged* from said institution shall be sexually sterilized; the superintendent is authorized to perform, or cause to be performed, the operation of sterilization on any such *patient afflicted with hereditary form of insanity* that are recurrent, idiocy, imbecility, feeblemindedness, or epilepsy, provided, such superintendent shall have first complied with the requirements of the act.

The succeeding section requires the superintendent to present to the Board of Affairs a petition stating the facts to be considered and the reason for his opinion that *society and the patient* will be best served by the operation. This petition is served upon the patient, a guardian is provided for and allowed compensation, a hearing is had before a board authorized to "receive and consider as evidence at said hearing the commitment papers and other records of said patient with or in any of the aforesaid institutions after certification by the superintendent, *together with such other and legal evidence as may be offered by any party to the proceedings.* The board is authorized to deny the petition, or if it shall find that the patient is insane, idiotic, imbecilic, feebleminded, or epileptic, and *by the laws of heredity* is the probable potential parent of socially inadequate offsprings likewise afflicted", and that the operation

can be done without injury to the health, they may order it to be performed. (Italics ours.)

In other words there is here recognized the limitations of age, a judicial finding is required that the patient is in fact afflicted with injurious characteristics that may be inherited; the mouth of the defendant is not closed by happenings, it may be disjointed or long removed from each other, no one of which may bear any relation to the other and which have not necessarily sprung from any common contributing cause. There is no conclusive numerical yardstick.

An appeal is then provided for, reaching eventually to the Supreme Court of the State.

No such salutatory provision is found in the act under consideration.

As was said in the application for the writ, it erects an arbitrary numerical standard, and with this measuring stick determines conclusively two facts: *(1)* that the defendant is capable of procreation, and *(2)* that his offspring will inherit criminal tendencies provided the defendant has not been convicted of bootlegging, smuggling, treason, or embezzlement—or to give the exact verbiage of the Act: "provided he is not convicted of offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses."

It is, we respectfully urge, especially to be borne in mind that no regard is provided in the act for proof of any fact that might relieve the defendant of the humiliation and mental suffering resulting from his sterilization.

As was said in *Davis* v. *Berry*, 216 Fed. 413, it "is unusual, ignominous, degrading * * *, it continues during the life of the defendant, involving humiliation and mental suffering."

No requirement of any showing provided for in the Virginia sterilization act under which the *Buck* v. *Bell* case, *supra*, was considered "that it is for the best interest of patient and of society, that the inmate" should be sterilized.

If it is a civil action, the mutilation should be inflicted only if someone should be benefitted by it. If the public safety, health, or morals were the sole object, should not the defendant be allowed to show that the operation would be futile, that perchance he was incapable of exercising the power of procreation, either through prior destruction of the transmitting glands by reason of age, or any other sufficient cause. Indeed, if the law be literally construed, the defendant could not show that he had been subjected to the very operation sought to be performed at some prior period! There are but two questions to be answered: *(1)* have you three times been convicted, once in the State of Oklahoma, and *(2)* will your health be endangered?

Does this measure to the standard of protection given by the due process clause?

The majority opinion appealed from, we respectfully suggest begged the question when it said (R. 32):

> "We think no one would doubt that this court should sustain the present law if it required a third finding to the effect that the accused is the potential parent of offspring with inherited criminal tendencies. But in the very nature of the case, testimony by expert witnesses on this question would be highly speculative and a finding by a jury or court, based upon such testimony, would likewise be speculative. The opinion of the experts would probably be based, in part at least, upon data that was available to, and considered by the Legislature at the time of enacting the law. If a court or jury can make a finding of fact based upon such speculative evidence, we see no reason why the Legislature (fol. 56) cannot find or assume facts,

based upon the same speculative evidence, as a basis for the exercise of the police power."

If this is a civil action, it seeks to deprive a defendant of the use of the faculties given him by nature. To say that he will not be allowed to defend himself because the only evidence that can be produced (in the opinion of the judges concurring) is speculative violates every concept of civil or criminal law underlying our judicial structure.

We would not deprive the poorest beggar, or the most prosperous tycoon of a dime or a dollar without some showing that some person or the public was entitled to demand it. He is not being punished they claim. Society is to be benefitted, yet, whether man or woman, whether young or old, whether capable or incapable of procreation, our "civil proceeding" will arbitrarily reach out and deprive him of "the right to beget children * * * one of the highest natural and inherent rights protected by * * * the Fourteenth Amendment of the Constitution of the United States relating to due process." (Dissenting opinion—R. 34-35.)

If it is not intended as punishment, if it is not penal in its nature, can we inflict the humiliation and degradation without we know of some justifying cause?

"The hearing provided by the Act doesn't provide for inquiry into any possible criminal *traits* of the person informed against ('traits' and 'acts' are not synonymous). Requires no finding determining such traits are transmittable to his posterity, nor whether by accident, disease, age, infirmity, or for other reason such person is reasonably capable of producing offspring * * *." (Dissenting opinion, R. 35-36.)

As before suggested it can be sustained only upon the assumption that it is conclusively established by reason

of three convictions: *(1)* that the defendant is capable of begetting of offspring, and *(2)* that the traits he will transmit are criminal ones.

To constitute due process of law conformity must be had to the established and fundamental rules governing the competency of evidence. A legislature may not enact an arbitrary or unreasonable standard and so deprive an accused of a reasonable opportunity to submit pertinent facts bearing upon the issues. It may make the existence of one fact presumptive evidence of the existence of another; but they are not allowed to shackle the litigant so that he may not show the truth if the presumption is erroneous.

This Honorable Court had under consideration the case of *Manley* v. *State of Georgia*, 272 U. S. 1, 73 L. ed. 575, under a statute of that State declaring:

> "Every insolvency of a bank shall be deemed fraudulent and the president and the directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one (1) year nor longer than ten (10) years; provided, that the defendant in a case arising under this section, may repel the presumption of fraud by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents receiving a commission for their services are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner."

After conviction Manley appealed to this Honorable Court. The first, second and third syllabi of the reversing opinion are as follows:

> "*Constitutional Law*, 830—*Due Process—Statutory Presumption—Validity.*
>
> "*1.* State legislation that proof of one fact, or group of facts, shall constitute prima facie evidence

of the main or ultimate fact in issue does not constitute a denial of due process of law if there is a rational connection between what is proof and what is to be inferred, and the presumption is not unreasonable, and is not made conclusive of the rights of the person against whom it is raised.

"*Constitutional Law.* 829—*Arbitrary Presumption—Invalidity.*

"*2.* A statute creating a presumption that is arbitrary, or that operates to deny a fair opportunity to repel it, violates the due process clause of the 14th Amendment to the Federal Constitution.

"*Constitutional Law.* 827—*Legislative Fiat—Sufficiency.*

"*3.* Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty, or property."

In the body of the opinion the following language is used:

"State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred.

"If the presumption is not unreasonable, and is not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43, 55 L. ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amendment. *Bailey* v. *Alabama*, 219 U. S. 219, 233, *et seq.*, 55 L. ed. 191, 198, 31 Sup. Ct. Rep. 145. *Mere*

legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property."

In *McFarland* v. *American Sugar Refining Company*, 241 U. S. 79, 60 L. ed. 899, was considered a suit by the refining company against the Inspector of Sugar Refining, the Governor and Attorney General of Louisiana to prevent the enforcement of an act of the General Assembly of the State which declared in part:

> "Any person engaged in the public refining of sugar within the State who shall systematically pay in Louisiana less price for sugar than he pays in any other state shall be prima facie presumed to be a party to a monopoly or conspiracy in restraint of trade and commerce."

It provided for a penalty of $500.00 and revocation of license. Further provided that if the refinery were shut down for more than a year this would be presumed to be for the purpose of violating the act, etc.

Section 1 of the act further made reports of Legislative Committee of the State and of the Senate or House of Representatives of the United States prima facie evidence of the facts set forth therein.

The suit was brought primarily to have the act declared invalid.

Mr. Justice HOLMES wrote the opinion. He says in part:

> "The answer is signed by the attorney general of the state; and if he were authorized to interpret the meaning of the other voice of the state heard in act No. 10, would seem to import that the latter was a bill of pains and penalties disguised in general words. For the first division of the answer shows that the plaintiff

is the only one to whom the act could apply, and that the statute was passed in view of the plaintiff's conduct, to meet it. It is upon the assumption of the latter fact that the argument is pressed that the plaintiff has no standing in equity, since it made the legislation necessary. If the connection were omitted, it would be so much the worse for the constitutionality of the act. We deem it enough to say that neither that supposed connection nor the general intimations of the plaintiff's wickedness in the answer deprive it of its constitutional rights, or prevent it from asserting them in the only practicable and adequate way.

* * * * * * *

"As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.' *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43, 55 L. ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime. If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it, and that therefore the plaintiff should be prima facie presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed."

There is one phrase in the first portion cited that impresses us:

> "The answer is signed by the attorney general of the state; and if he were authorized to interpret the meaning of the other voice of the state heard in Act No. 10, would seem to import that the latter *was a bill of pains and penalties disguised in general words.*"

This verbiage impresses us as being peculiarly applicable to the instant case.

In *Bailey* v. *Alabama*, 219 U. S. 219, 55 L. ed. 191, this Court considered an act of the Alabama Legislature declaring "Any person who with the intent to injure or defraud his employer enters into a contract in writing for the performance of any act or service and thereby obtains money or other personal property from such employer and with like intent, without just cause, and without refunding such money or paying for such property, refuses or fails to perform such acts or services" shall be punished by a fine, etc.; and further providing, "the refusal or failure of any person who enters into such contract to perform such act or service * * * or refund such money or pay for such property without just cause shall be prima facie evidence of the intent to injure his employer or landlord and defraud him."

A rule of evidence in force in Alabama prevented a person from testifying to his uncommunicated motives, purposes or intents.

Bailey was convicted, the case was appealed and in the opinion was discussed at length the facts and legal phases and held that the act deprived Bailey of his liberty without due process of law because the presumption was in fact a conclusive presumption.

Mr. Justice HUGHES said:

"This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 749, 37 L. ed. 905, 925, 13 Sup. Ct. Rep. 1016. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be prima facie evidence of the main fact in issue; and where the inference is not purely arbitrary, and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law, or a denial of the equal 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; *Mobile J. & K. C. R. Co.* v. *Turnipseed*, decided by this court December 19, 1910 (219 U. S. 35, *ante*, 78, 31 Sup. Ct. Rep. 136).

"The latest expression upon this point is found in the case last cited, where the court, by Mr. Justice LURTON, said: 'That a legislative presumption of one fact from evidence of another may not constitute a denial of the equal protection law, it is only essential that there shall be some rational connection between the fact proved and the ultimate fact "presumed" and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself, prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him.'"

Surely the facts in this case are no less compelling than those this Court here considered. Police power of the State

cannot extend so far that a defendant is precluded from showing that he should not be mutilated; that such act would merely inflict punishment upon him.

Again we suggest, in the language of Mr. Justice HOLMES, "it is a bill of pains and penalties disguised in general words."

There can be no question, surely, that an individual has a right to the possession of all of the faculties with which nature endows the human body: sight, hearing, the right to use his hands and feet are certainly rights the use of which constitute fundamental liberties protected from invasion by constitutional fiat. Why except from them the right of procreation; unless, as in the *Buck* case, or the *Main* case, there is an overwhelming reason existing in the individual himself that intimately and certainly affects the public? Could not the State more logically order amputated the gun finger of a hi-jacker?

This question is sought to be evaded by the suggestion that the operation was minor and left the patient, or victim, capable of enjoying the "sexual congress", robbing him only of the power of procreation.

There is something singularly obscene in this suggestion. It indicates a declaration that lascivious gratification is the chief reason why men and women are endowed with this urge and given the right to its proper fulfillment. Certainly it was bestowed that the human race might continue to exist. The procreative instinct that pervades all animal life makes possible our natural growth and existence. Nature, and the God of nature, didn't intend that the earth be habited by a race of eunichs.

This Honorable Court in *Meyer* v. *Nebraska*, 262 U. S. 390, 67 L. ed. 1042, at page 1045, said:

"While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by freemen."

This text is followed by a wealth of citations, then follows:

"The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to supervision by the courts. *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499."

Adopting the language of the dissenting opinion (R. 35) we respectfully suggest:

"In the Act under consideration the Legislature has, in my judgment, restricted the power of the court in its hearing of applications filed thereunder to unreasonable, illegal and, I may add, unwise lengths * * *."

It is therefore unconstitutional and void.

II.

The Petitioner complains that he is being placed twice in jeopardy for the same offense in violation of the Bill of Rights and Article 5 thereof, and of the Constitution of the United States.

Section 6 of the Act heretofore copied in this brief provides generally that whenever it has been brought to the attention of the Attorney General by the County Attorney, of warden, or other officer in charge of the penal institution *"or through information furnished him from any reliable source, that any person has the status of an habitual criminal as herein defined"* the Attorney General shall investigate and if he satisfies himself that he can establish the fact of habitual criminality he shall commence proceedings provided by the Act. He appears to be barred by no statute of limitation. He may reach back through whatever period of time and circumstances his numerical standard may justify, if two of the offenses have been committed even prior to the founding of the State of Oklahoma it makes no difference, he measures him by this standard and without regard to the intervening lapse of years between the second and third offense, or between the third and the date of the filing of the complaint, he is brought before the court, an answer is found to the questions: Have you been convicted three times? Will it endanger his health to emasculate him? If the answer to each conforms to the requirements of the statute, he then, in not less than twenty days, is to be made sterile.

Under Section 13 he may by the sheriff be thrown in jail, a bond may be fixed, and, though the judgment purports to be a civil judgment, its execution is governed wholly by our concept of criminal procedure.

It makes no difference that he has paid in full the pen-

alties exacted by the laws when the court sought to find a measure that would satisfy the debt he owed society for his misdeeds; not because of any known benefit that society will receive by reason of the additional penalty inflicted, because it can be nothing less than a penalty — unless society is to be benefitted.

The mandate of statute so closes the mouth of the defendant that he may not even show that his former convictions had been found erroneous; that the sovereignties under which such convictions were pronounced had forgiven him because of his innocence, that the offenses in fact were not acts that betoken his normal personality, that they resulted it may be from overwhelming emotion; that in fact his family history, his background and the years of his life it may be since the commission of the offenses belies the idea of congenital criminality.

But, through sheriffs, and prisons and force he is sought out, a shamed thing, to tread the remaining years of life under clouds of renewed and added humiliation; and this, too, even though "accident, disease or age" had robbed him, or her, of sexual desire or impulse.

The words of Mr. Justice HOLMES come with redoubled force: "It is a bill of pain and penalties disguised in general words."

We realize that this Article to the Bill of Rights, as to a large measure of its force is intended to apply to matters in which the Federal Government is involved; but in this instance the rights violated, or that will be violated, should, we believe, be deemed vested rights. Surely the State of Oklahoma has no right to impose additional burdens, pains or penalties upon one because of convictions for offenses had in sister states. When he left the custody of such state,

whether by pardon, or service of sentence, he had the right of full, complete and personal liberty — the same right that every other citizen had.

Surely the right to breathe the air, enjoy the sunshine and pass up and down the highways of the country unafraid and untroubled is valuable; surely it is one which he can claim as vested in him, unless again forfeited by some infringement of the law.

True, it is not a right of property, but it is a right of personal liberty, more highly prized than property; and the State of Oklahoma should not be permitted to revive debts that have been paid, debts due a sovereignty other than her own and paid in full, and there make it a basis upon which additional punishment may be inflicted, under the specious guise of eugenics. The police power of the State should not be held to reach so far. Such legislation bears no reasonable relation to the health, safety, morals, or welfare of the people; this, notwithstanding discredited theorems of Cesare Lombroso and the over-zealous biological and engenic crusaders who believe his pronouncements as to the atavistic nature of criminals.

What we have said here applies largely to the third ground of the complaint:

III.

The Petitioner complains that the Act violated Section 10 of Article 1 of the Constitution of the United States, declaring in part as follows:

"No state shall * * * pass any bill of attainder * * * expost facto law or * * *."

This, and as well the fourth ground of his complaint, as follows:

"IV.

The Supreme Court of the State of Oklahoma erred in that it held that the Legislature of said State could confer upon the District Court of that State the power to inflict additional punishment for offenses committed outside of the territorial limits of said State."

Nor can it make such extra-territorial convictions a basis for additional punishment within the State.

It is certain that the enforcement of the law as it is written was really never intended.

Section 6 of the Act was probably thrown in to avoid a judicial declaration that it did not conform to the equal protection provision of the Federal Constitution. It provides no machinery by which any adequate enforcement could be had against those not found within the walls of the penitentiary, or other penal institutions. It opens, it is true, a field in which the vicious or the meddlesome might satisfy a grudge, or satiate his self-sufficient sense of superiority by pointing out the misdeeds of some hapless neighbor. But, if the State of Oklahoma should attempt to enforce the law as it is writ the judicial currents would be clogged and the orderly functions of justice be brought to a practical standstill.

We wonder if it would not be possible that a felon of treasonable instincts, convicted of treasonable acts would not be among the first of those who would take advantage of his own immunity to impose confusion upon the courts and humiliation upon the less happy culprits around him?

It impresses us that the affirming opinion in this case is based upon a concept of the infallibility of legislative bodies. It goes further than any other called to our attention in reviving the outmoded and long discarded theory that the "king can do no wrong."

Were this the law of the land the declarations of the Fourteenth Amendment were less than "sounding brass or tinkling cymbals."

The precise purpose of the Amendment is to protect the individual against legislative acts unduly intruding upon his liberty; giving to him a privilege to question such conduct in the courts of his country.

How best to promote the moral integrity of the nation is a question looming large and it is of consequence to every citizen, but the practical value of sterilization has been discounted by history and by science.

It is not hard to remember that in early English days Mr. Blackstone stated:

> "But now the general punishment of all felons is the same, namely, by hanging."
>
> —Blackstone, Book 4, page 216.

No one has suggested that hanging is less effective than emasculation, and no one has ever suggested that in this drastic period of English history there was any diminution of the quota of crime.

We may again remember that with the coming of more kindly days the felons who formerly would have been hanged became colonists in far Australia and Tasmania. There, under different *environment*, their initiative asserted itself, opportunities were seized, hardships were borne, but they have builded an empire in the South Pacific protected by manhood not less worthy than our own. Environment, not heredity, moulded them.

Where similar statutes have had wide vogue it is found to have had no appreciable effect on the incidents of crime and it often leads to sexual promiscuity and consequent spread of veneral disease.

—Richmonds Sterilization in Wisconsin, 25 J. Crim. L. 586;

Barnes on Vasectomy, 29 N. Eng. Med. Monthly, 59-62;

Fink, Causes of Crime, 210;

4 J. Crim. L. 326;

Landman — The Human Sterilization Movement, 24 J. Crim. L. 400;

Landman — Human Sterilization, 183-202.

Your Petitioner respectfully prays that this Honorable Court grant him relief from the judgment heretofore rendered against him, and that he be protected in the rights of which it seeks to deprive him.

All of which is respectfully submitted.

GUY L. ANDREWS,
H. I. ASTON,
Attorneys for Petitioner.

In the Supreme Court of the United States

October term, 1941.

No. 782

JACK T. SKINNER, *Petitioner,*

vs.

STATE OF OKLAHOMA, ex rel. MAC Q. WILLIAMSON, Attorney General, *Respondent.*

ANSWER BRIEF OF STATE OF OKLAHOMA, EX REL. MAC Q. WILLIAMSON, ATTORNEY GENERAL, RESPONDENT.

MAC Q. WILLIAMSON,
Attorney General of Oklahoma,
State Capitol,
Oklahoma City, Oklahoma,
Attorney for Respondent.

Harlow Publishing Corporation, Oklahoma City, Okla.

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In the Supreme Court of the United States

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ISSUES

The issues as stated by the petitioner are clear-cut. His statement of the case is substantially correct, and the respondent has nothing to add thereto. There is no dispute as to the sufficiency of the evidence considered at the trial of the case in the trial court in Oklahoma. The only issue, or issues, to be determine is the validity, or constitutionality, of the 1935 enactment of the Legislature, referred to and discussed in the petitioner's brief and hereinafter referred to as the Oklahoma Habitual Criminal Sterilization Act, by which name it is authorized to be called by Section 1 of the Act. The contentions of the petitioner, as set forth in his Petition for Writ of Certiorari, are:

(1) The Oklahoma Habitual Criminal Sterilization Act is violative of the 14th amendment of the Constitution of the United States, in that it deprives the petitioner of "life, liberty, or property, without due process of law" and denies him "equal protection of the laws."

(2) The Oklahoma Habitual Criminal Sterilization Act is violative of the 5th amendment (Bill of Rights) of the Constitution of the United States, in that the petitioner has been made "subject for the same offense to be twice put in jeopardy of life or limb."

(3) The Oklahoma Habitual Criminal Sterilization Act violates Section 10 of Article 1 of the Constitution of the United States in that said Act is a bill of attainder and an ex post facto law.

(4) The Supreme Court of the State of Oklahoma erred in holding that the Legislature of the State of Oklahoma "could confer upon the District Courts of that State the power to inflict additional punishment for offenses committed outside of the territorial limits of said State."

In the trial court the petitioner raised the question that the Oklahoma Habitual Criminal Sterilization Act was violative of the 8th amendment (Bill of Rights) of the Constitution of the United States in that it provided for the infliction of a cruel and unusual punishment, which contention he has apparently abandoned this contention

not being set forth in his Petition for Writ of Certiorari and not being argued in his brief. Only the questions specifically brought forward by the Petition for Writ of Certiorari will be considered by this Court. Paragraph 2 of Rule No. 38 of the *Rules of the Supreme Court of the United States; General Talking Pictures Corporation* v. *Western Electric Company, Inc., et al.*, 58 S. Ct. 849; 304 U. S. 175, 82 L. Ed. 1273. Consequently this brief will be confined to the four contentions above set forth, which are the only ones argued by the petitioner.

I

ARGUMENT AND AUTHORITIES

The Oklahoma Habitual Criminal Sterilization Act does not deprive the petitioner of "life, liberty, or property, without due process of law" and does not deny to him "equal protection of the laws" in violation of the 14th Amendment of the Constitution of the United States.

We first call attention to the fact that the said 1935 Act of the Oklahoma Legislature does not even purport to impose a punishment or penalty, but is purely an eugenic measure and an exercise of the police power of the State of Oklahoma. This is obvious when the entire Act is considered. It is not necessary for the Legislature to state specifically that the said Act is a police measure. The entire Act, and all of its provisions, must be considered as an entirety to ascertain the purpose of the legislation.

In the case of *Packard Motor Car Company* v. *United States*, 39 F.2d 991, it was said:

> "It is a well established principle in the exposition of the statutes, that every part is to be considered, and the intention of the Legislature to be extracted from the whole. United States v. Fisher, 2 Cranch, 358, 2 L. Ed. 304; Kohlsaat v. Murphy, 96 U. S. 153, 24 L. Ed. 844; Hellmich v. Hellman, 276 U. S. 233, 48 S. Ct. 244, 72 L. Ed. 544, 56 A. L. R. 379."

Consideration of all of the provisions of said Act clearly discloses that its objective is similar to that of the

sterilization law involved in the case of *State* v. *Troutman*, 50 Idaho 673, 299 Pac. 688, where it was said:

> "Briefly, the act as amended creates the state board of eugenics composed of the State Public Health Adviser, and the Superintendents of the Northern Idaho Sanitarium, the State School and Colony at Nampa, the Idaho Insane Asylum, the Idaho Industrial Training School, and the *warden of the penitentiary*. It requires that said superintendent of each of the state institutions report quarterly to the board of eugenics all persons who are feeble-minded, insane, epileptic, *habitual criminals*, moral degenerates, and sexual perverts, who are, or in their opinion are likely to become, a menace to society.
>
> "The law requires the board to inquire into the innate traits, the mental and physical conditions, the personal records, and family traits and histories of all persons so reported, and if after such examination a majority of said board are of opinion procreation by such person would produce a child having inherited tendency to feeble-mindedness, etc., or would probably become a social menace or ward of the state, and there is no probability that the condition of such person so investigated will improve, the board shall make an order embodying its conclusions and specifying the type of sterilization as may be deemed best suited to the condition of such person. The findings and conclusions of the board shall be in writing. A copy of the order shall be served on the person affected unless insane or feeble-minded in which case it must be served upon his guardian or nearest kin. If the person whose condition has been examined and his legal guardian or nearest known kin consents in writing to the operation advised, it shall be performed under the direction of the state board of health adviser.

"If consent in writing is not given, the board of eugenics shall file its findings, conclusions, and order in the district court as a basis and pleading upon which summons shall issue and trial be had as to whether the findings, conclusions, and order of the board shall be affirmed by the court.

"All the safeguards are afforded to the person concerned as fully as are afforded by a proceeding at law, with right of full review by appeal from the district court to the supreme court."

The Court held in the case last mentioned that the sterilization law therein involved not to be "unconstitutional as contravening guaranties of life, liberty, and pursuit of happiness and safety, but reasonable act protective of general welfare within state's police power" and also held that the law was not unconstitutional "as not affording equal protection of the law."

With regard to one of the contentions of the appellant, the Court said:

"It is contended that the constitutional safeguards in a criminal prosecution are violated. We find this proceeding is in no sense a criminal prosecution."

The Oklahoma Act is patently a police measure and is not designed to penalize or punish an habitual criminal as defined by the Act. This is so apparent from an examination of the provisions of the Act that no further citation of authority is required. There then arises the question as to whether or not the said Act is a proper and

reasonable exercise of the police power of the State of Oklahoma. In this connection, attention is called to the case of *Smith* v. *Command*, 231 Mich. 409, 204 N. W. 140, 40 A. L. R. 515, where it was said:

> "It is true that the right to beget children is a natural and constitutional right, but it is equally true that no citizen has any rights superior to the common welfare. Acting for the public good, the state, in the exercise of its police powers, may always impose reasonable restrictions upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society, what right has any citizen or class of citizens to beget children with an inherited tendency to crime, feeble-mindedness, idiocy, or imbecility? * * * It is a right which this statute, enacted for the common welfare, denies to him. The facts and conditions which we have here related were all before the Michigan Legislature. Under the existing circumstances, it was not only its undoubted right, but it was its duty, to enact some legislation that would protect the people and preserve the race from the known effects of the procreation of children by the feeble-minded, the idiots, and the imbeciles.
>
> "Thus far we have been attempting to show that this statute, measured by the purpose for which it was enacted and the conditions which warranted it, and justified by the findings of biological science, is a proper and reasonable exercise of the police power of the state."

Cooley on Constitutional Limitations (8th Edition), page 1231, states the following rules:

> "A police measure must fairly tend to accomplish the purpose of its enactment, and must not go beyond the reasonable demands of the occasion. *But a large*

discretion is necessarily vested in the legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. (Italics ours)

"That the legislature directs its police regulations against what it deems an existing evil, without covering the whole field of possible abuses, does not render its action obnoxious to the equal protection clause of the Federal Constitution; and it is not, of itself, a valid objection to a police regulation that it is made applicable only to a segregated area or district."

In *Ruling Case Law*, Volume 6 (Constitutional Law), it is said:

"The general rule is that the question of the reasonableness of an act otherwise within constitutional bounds, is for the legislature exclusively, and in ordinary cases the courts have no revisory power concerning it, or to substitute their opinion for the judgment of the legislature. Courts are not at liberty to declare statutes invalid although they may be harsh, and may create hardships or inconvenience, or are oppressive or are mischievous in their effects and burdensome on the people and of doubtful propriety. The Courts are not the guardians of the rights of the people against oppressive legislation which does not violate the provisions of the constitution. The protection against such burdensome laws is by an appeal to the justice and patriotism of the people themselves or of their legislative representatives." (P. 106, 107, sec. 105).

"Legislative acts within the power of the legislative body are not subject to revision or control by the Courts, on the ground of inexpediency, injustice or impropriety, or because they are contrary to the principles of natural justice, or are based on con-

ceptions of morality with which the courts may disagree, or even because they create unjust differences not prohibited by the constitution. The justice or injustice of statutory provisions is a question for the legislature, not for the court." (P. 107, sec. 106).

"The propriety, wisdom and expediency of legislation is exclusively a legislative question, and the courts will not declare a statute invalid because in their judgment it may be unwise or detrimental to the best interests of the state. The courts can have no concern as to the expediency, the wisdom, or the necessity for the enactment of laws. Or, as has been said, the courts do not sit to review the wisdom of legislative acts, and it is not for the court to decide whether a law is needed and advisable in the general government of the people. Constitutionality of legislative acts is to be determined solely by reference to the limits imposed by the constitution. The only question for the courts to decide is one of power, not of expediency, and statutes will not be declared void simply because, in the opinion of the court, they are unwise." (P. 107-109, sec. 107).

"LEGISLATIVE DETERMINATION OF FACTS. On frequent occasions the constitutionality of a statute depends on the existence or non-existence of certain facts. In view of the presumption in favor of the validity of statutes, it must be supposed that the legislature had before it when the statute was passed any evidence that was required to enable it to act; and if any special finding of fact was needed in order to warrant the passage of the particular act, the passage of the act itself is treated as the equivalent of such finding. The validity of legislation which would be necessary or proper under a given state of facts does not depend on the actual existence of the supposed facts. It is enough if the law-making body may rationally believe such facts to be established. Under the American system of government

by the people through their chosen representatives, practical legislation admits of no other standard of action. The fact that the finding of the legislature is in favor of the truth of one side of a matter as to which there is still room for difference of opinion is not material. What the people believe is for the common welfare must be accepted as tending to promote the common welfare whether it does in fact or not. It has been said that any other basis would conflict with the spirit of the constitution, and would sanction measures opposed to a republican form of government. As a general rule, therefore, it may be stated that the determination of facts required for the proper enactment of statutes is for the legislature alone, that the presumption as to the correctness of its findings is conclusive, and the courts do not have jurisdiction or power to re-open the question or make new findings of fact." (P. 111-112, sec. 111).

"JUDICIAL REVIEW OF LEGISLATIVE DETERMINATION AS TO FACTS. Since the determination of questions of fact on which the constitutionality of statutes may depend is primarily for the legislature, the general rule is that the courts will acquiesce in the legislative decision unless it is clearly erroneous. Whenever the determination by the legislature is in reference to open or debatable questions concerning which there is a reasonable ground for difference of opinion, and there is probably basis for sustaining the conclusion reached, its findings are not subject to judicial review, nor is there any right to a trial by jury as to the facts within the scope of legislative determination. In such cases the courts have no power to determine the merits of conflicting theories, nor to conduct an investigation of facts which may enter into questions of public policy or expediency, and to sustain or frustrate the legislation according to whether the courts happen to approve or disapprove of the de-

termination of such questions of fact by the legislature. This principle has been applied to statutes relating to various subjects, such as the mode of executing death sentences, the testing of milch cows with tuberculin, and the compulsory vaccination of school children." (P. 114, Sec. 113).

"JUDICIAL NOTICE OF FACTS INVOLVED IN CONSTITUTIONALITY OF STATUTES. In applying the constitutional limitation of reasonableness in the exercise of the police power, courts may determine from an inspection of the provisions of a statute under consideration whether it properly relates to matters within the limits of the police power, but in the exercise of this revisory power they are limited to a consideration of the language of the statute itself and to such facts as may be noticed judicially, and consequently they cannot consider evidence aliened to show the invalidity of the statute. Therefore, the general rule is that in determining the vaidity of a statute, the court will treat the question as one of law, resort being had to extrinsic considerations only to the extent that the facts are, or may become, a matter of judicial knowledge." (P. 115, Sec. 114).

"NATURE OF POLICE POWER. The police power is an attribute of sovereignty, possessed by every sovereign state, and is a necessary attribute of every civilized government. It is inherent in the states of the American Union and is not a grant derived from or under any written constitution. It has been said that the very existence of government depends on it, as well as the security of social order, the life and health of the citizen, and the enjoyment of private and social life and the beneficial use of property. It has been described as the most essential, and at times the most insistent, and always one of the least limitable of the powers of government." (P. 183-184, Sec. 182).

"DIFFICULTY OF DEFINITION. While there have been many attempts to define the police power it has not yet received a full and complete definition. The difficulty has been frequently commented on, and it has been said that the police power is from its nature incapable of any exact definition or limitation, because none can foresee the ever-changing conditions which may call for its exercise. The boundary line which divides the police power of the state from the other functions of government is often difficult to discern, and the limitations of the power have never been drawn with exactness. It has been said repeatedly that it is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." (P. 184-185, Sec. 183).

"PLASTICITY OF POLICE POWER. The police power of the state, never having been exactly defined or circumscribed by fixed limits, is considered as being capable of development and modification within certain limits, so that the powers of governmental control may be adequate to meet changing social, economic, and political conditions. It is very broad and comprehensive, and is liberally understood and applied. The changing conditions of society may make it imperative for the state to exercise additional powers, and the welfare of society may demand that the state should assume such powers." (P. 189, Sec. 188).

This Court upheld a sterilization law enacted by the Legislature of Virginia, in the case of *Buck* v. *Bell*, 47 S. Ct. 584, 274 U. S. 200, 71 L. Ed. 1000, where it was said:

"The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It

certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited and that Carrie Buck 'is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization,' and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the court obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. *The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.* Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765. Three generations of imbeciles are enough."

16 *Corpus Juris Secundum*, 1141, Section 567, states the following definition:

"A widely accepted definition is that of Judge Cooley to the effect that due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribed for the class of cases to which the one in question belongs."

There is nothing in the Oklahoma Habitual Criminal Sterilization Law which deprives any person of a hearing, after due notice thereof, which the petitioner does not deny he has had. He is given the right of a jury trial, and is entitled to appeal to the Supreme Court of Oklahoma. Thus all of his rights are safeguarded and protected. In this connection, we quote from the opinion in the case of *State* v. *Troutman*, supra:

> "It is claimed due process of law is not afforded. The proceeding is pursuant to summons duly issued and served, and every safeguard known to a regular and orderly hearing in a court with right of appeal is afforded. The act not only affords due process but unless written assent is procured requires a complete open judicial proceeding."

In *Smith* v. *Command*, supra; the 11th paragraph of the syllabus is as follows:

> "A statute providing for sterilization of feeble-minded persons which provides for notice of time and place of hearing by personal service not only on the feeble-minded persons, but upon other interested persons, with opportunity to defend and right to appeal, does not deprive such persons of rights without due process of law."

In the body of the opinion it was said:

> "Nor does this statute violate the 'due process of law' clause of the Constitution. It requires ample notice of the time and place of hearing by personal service, not only on the alleged defective, but upon the prosecuting attorney of the county, upon the relatives, father, mother, wife, or child of the defective, or upon the person with whom he resides,

> or at whose house he may be; and, in case no relatives can be found, service is required upon a guardian ad litem appointed by the court to receive such notice and to represent the defective at the hearing. Regular proceedings are followed, and opportunities to defend with the right of appeal are provided. Nothing further is required by the 'due process of law' clause of the Constitution."

We submit that the Oklahoma Habitual Criminal Sterilization Act does not deprive the petitioner of life, liberty, or property, without due process of law, either under the Federal Constitution or the Oklahoma Constitution.

We also submit that the petitioner has not been and is not being denied equal protection of the laws of the State of Oklahoma. 16 *Corpus Juris Secundum*, 997, states the following rule:

> "Discrimination alone, irrespective of its basis or effect, is not the test of denial of equal protection of the laws by a statute."

The petitioner cannot complain about equal protection of the laws, merely because other persons are not within the class in which he is included. He is placed in the same category as those similarly situated, and he is subject to nothing more than others who have been thrice convicted of crimes involving moral turpitude.

The petitioner cites on page 13 of his brief the case of *Davis* v. *Berry*, 216 Fed. 413, in support of his conten-

tion that the Oklahoma Habitual Criminal Sterilization Act is repugnant to the "due process of law" provisions of the Constitution of the United States. The decision in that case is clearly distinguishable and is not applicable to the Oklahoma Act, the said decision being based upon the failure of the Act there involved to require a hearing or to give the prisoner an opportunity to produce evidence, which is not true of the Oklahoma Act. We quote from the Court's opinion in said case:

> "And it is of no importance in argument whether the prison physician does this on his own motion or under an order of the state board of parole. The hearing is by an administrative board or officer. There is no actual hearing. There is no evidence. The proceedings are private. The public does not know what is being done until it is done. Witnesses are not produced, or, if produced, they are not cross-examined. What records are examined is not known. The prisoner is not advised of the proceedings until ordered to submit to the operation. And yet in many cases there will be involved a serious controverted question of fact. The records of two convictions may show the same name of the party or parties convicted; but there are many men of the same name, but which is no proof that the person in the one case is the same person convicted in the other case. It is common knowledge that many prisoners take assumed names. Who is to determine whether the various names represent one and the same person? And if one of the convictions was in another state, the question will arise whether it was for a felony. These are inquiries that must be held in the open with full opportunities to present evidence and argument for and against. To uphold this statute it must be affirmed that the board of parole or prison physician must hear the evidence

and examine laws of other states without notice, and in the prisoner's absence, and determine these questions. And if determined adversely, the prisoner has no remedy, but must submit to the operation.

"In the case at bar the hearing was a private hearing, and the prisoner first knew of it when advised of the order. Due process of law means that every person must have his day in court, and this is as old as Magna Charta; that some time in the proceedings he must be confronted by his accuser and given a public hearing."

The Oklahoma Act gives the defendant a public hearing, with a right to trial by jury and appeal to the Supreme Court of the State. Thus it will be seen that the decision in *Davis* v. *Berry*, supra, can have no application to the Oklahoma Act.

The petitioner also cites the case of *Smith* v. *Board of Examiners*, 88 Atl. 963, on page 13 of his brief, but significantly he does not recite the reason for the Court's decision in the case, which was, as will be seen from an examination of the Court's opinion, because the Act was limited to inmates of charitable institutions and was not made applicable to persons outside charitable institutions. We quote from the Court's opinion in the case:

"Turning our attention now to the classification on which the present statute is based, and laying aside criminals and persons confined in penal institutions with which we have no present concern, it will be seen that—as to epileptics, with which alone we have to do—the force of the statute falls wholly upon such epileptics as are inmates confined in the several

charitable institutions in the counties and state.' It must be apparent that the class thus selected is singularly narrow when the broad purpose of the statute and the avowed object sought to be accomplished by it are considered. The objection, however, is not that the class is small as compared with the magnitude of the purpose in view, which is nothing less than the artificial improvement of society at large, but that it is singularly inept for the accomplishment of that purpose in this respect, viz., that if such object requires the sterilization of the class so selected, then a fortiorari does it require the sterilization of the vastly greater class who are not protected from procreation by their confinement in state or county institutions."

The same thing is true of the case of *Osborn* v. *Thomson*, 169 N. Y. Supp. 638, cited by the petitioner on page 14 of his brief. The third paragraph of the syllabus of said case is as follows:

"Public Health Law, §§ 350-353, as added by Laws 1912, c. 445, providing for operations for prevention of procreation by certain feeble-minded persons and criminals when confined in state institutions, is unconstitutional and void, as not providing equal protection of the laws, in that it does not apply to persons of identical tendency not confined in state institutions."

The reasoning of the State Supreme Courts in the two cases last mentioned is contrary to the views of the Supreme Court of the United States as expressed in the case of *Buck* v. *Bell*, supra, where it was said:

"But, it is said, however it might be if this reasoning were applied generally, it fails when it is con-

fined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course, so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached."

In *Central Lumber Company* v. *South Dakota*, 33 S. Ct. 66, 226 U. S. 157, 160, 57 L. Ed. 164, 169, this Court said that the State "may direct its laws against what it deems the evil as it actually exists without covering the whole field of possible abuses." And in *Rosenthal* v. *New York*, 33 S. Ct. 27, 226 U. S. 260, 271, 57 L. Ed. 212, 217, it was held that "the Federal Constitution does not require that all state laws shall be perfect, nor that the entire field of proper legislation shall be covered by a single enactment."

The legislative enactment involved in the case of *Williams* v. *Smith*, 190 Ind. 526, 131 N. E. 2, cited by the petitioner on page 14 of his brief, was similar to the one involved in *Davis* v. *Berry*, supra, in that it did not give the prisoner an opportunity to be heard, which, as has heretofore been pointed out, is not true of the Oklahoma Act involved in this case, for it (the Oklahoma Act) affords

him a public hearing with a right of jury trial and subsequent appeal to the Supreme Court of the State of Oklahoma.

The petitioner also cites the cases of *Manley* v. *State of Georgia*, 272 U. S. 1, 73 L. Ed. 575; *McFarland* v. *American Sugar Refining Company*, 241 U. S. 79, 60 L. Ed. 899; *Bailey* v. *Alabama*, 219 U. S. 219, 55 L. Ed. 191; and *Meyer* v. *Nebraska*, 262 U. S. 390, 67 L. Ed. 1042. In all of these cases, this Court adhered to the principle that a legislative presumption, or classification, must bear a rational connection with the ultimate results sought, with which we thoroughly agree. We assert that this principle was fully observed in the enactment of the legislation involved in this case. Three or more convictions of crimes involving moral turpitude certainly establish an individual as an habitual criminal whose criminal tendencies should not, in the sound exercise of the discretion a State may employ in determining what is best suited to provide for the future welfare of its citizenship, be passed on to posterity. We earnestly submit that there is not only reasonable, but almost certain, belief that children inherit the traits and characteristics of each and both of their parents, and to say that there is no reasonable relation or connection between the confirmed criminal traits of one who has been thrice convicted and those which might be passed on through in-

heritance almost borders on the absurd, it being common knowledge that bad traits as well as good traits are inheritable. The four cases last mentioned and cited by the petitioner do not even purport to deal with inheritable tendencies.

II

The Oklahoma Habitual Criminal Sterilization Act does not place the petitioner twice in jeopardy of life or limb for the same offense in violation of the 5th Amendment of the Constitution of the United States.

The 5th amendment of the Constitution of the United States provides that no person shall be subject for the same offense to be twice put in jeopardy of life or limb.

The Oklahoma Act does not even purport to punish an habitual criminal for prior offenses, as has been heretofore stated. It is strictly a police measure, and is not penal in nature. Its objective is not to jeopardize a person's "life or limb" and there clearly is no legislative intent to inflict an additional punishment for a crime previously committed. Its only purpose, as has been heretofore stated, is eugenic, and there is no element of punishment for a crime which has been previously punished.

III

The Oklahoma Habitual Criminal Sterilization Act does not violate Section 10 of Article 1 of the Constitution of the United States as being a Bill of Attainder or Ex Post Facto Law.

Section 10 of Article 1 of the *Federal Constitution* provides that no State shall "pass any Bill of Attainder" or "ex post facto law."

There is no merit to the contention that said Act is a bill of attainder. 16 *Corpus Juris Secundum*, 902 § 452, defines a bill of attainder as "a legislative act which inflicts punishment without a judicial trial." Even though it be assumed that the Act inflicts a punishment, which this respondent denies, full provision is made for a judicial hearing, with a right to trial by jury, and appeal to the Supreme Court of the State of Oklahoma.

The petitioner admits that his contention that the Act is an ex post facto law is dependent upon whether or not the legislation is penal or eugenic (p. 24 of the Petition for Writ of Certiorari and Brief in Support Thereof). He concedes that this contention cannot be upheld or sustained if the legislation is eugenic and an exercise of the police power of the State. He cites no cases or other authorities in support of his contention that the legislation is designed as a penalty rather than a police measure. If the Act is to be sustained as a police

measure, as it undoubtedly is, then it makes no difference where the offenses making the subject an habitual criminal were committed, whether in Florida, Texas, Oregon or Maine. Offenses, and convictions therefor, prove the criminal tendencies of the accused and he is none the less a confirmed criminal merely because one or more of his offenses were against the citizens of other states and were not all perpetrated against the citizenship of Oklahoma. As to the contention that the third or last conviction must be in Oklahoma under the terms of Section 3 of the Act, it is sufficient to say that the State of Oklahoma may, under its police powers, require at least one of the three requisite convictions to be in accordance with the procedure Oklahoma follows in determining whether a person is guilty of a crime.

IV

The Supreme Court of the State of Oklahoma did not hold, and did not err in holding, that the Oklahoma Legislature conferred upon the District Courts of Oklahoma "The power to inflict additional punishment for offenses committed outside of the territorial limits of said State."

The petitioner's 4th and last contention, as the others, is based upon the assumption that the 1935 Act inflicts a punishment. This assumption is false, and with this assumption the fourth contention must fall, for, as has been heretofore stated, the Act is a police measure and is not designed to inflict a penalty or punishment. It could have no other purpose.

It will be seen that all of the petitioner's contentions are hinged upon the proposition that the Oklahoma Habitual Criminal Sterilization Act is penal in nature, and is not an exercise of the police powers of the State of Oklahoma. If it were criminal in nature, then the appeal would be to the Criminal Court of Appeals of the State of Oklahoma. The petitioner has not attempted to appeal to that Court, which is the proper appellate tribunal in all criminal matters in the State of Oklahoma. He has not pursued this course of action, which he would and should do if he were correct in his assertion that the proceeding is criminal in nature. The statutes of Oklahoma provide that appeals in all criminal matters must be taken

to the Criminal Court of Appeals of the State of Oklahoma, and the decisions of the Supreme Court of Oklahoma and of the Criminal Court of Appeals of Oklahoma are unanimous in holding that this is the proper course of procedure in criminal matters. This will not be denied or even questioned by the petitioner. The Legislature of Oklahoma very properly provided that this type of proceeding must be tried by the rules of civil procedure, and that appeals shall be taken to the Supreme Court of the State of Oklahoma, as in other civil matters, for the proceedings are essentially civil, and not criminal, as has been recognized by this Court and the Courts of other states in considering sterilization laws.

The petitioner complains that the Oklahoma Legislature should have delegated to an administrative agency the power and duty to determine whether or not a particular person has inheritable criminal tendencies. The petitioner apparently admits that this power and duty may be delegated to a subordinate agency by the Legislature. If this is true, then it must be conceded that the Legislature itself can determine these same facts, without referring such matters to a subordinate agency, for certainly the Legislature can exercise any function which it may delegate to others to perform.

The opinion of the Supreme Court of Oklahoma, which appears in the transcript of record filed in this case, beginning at page 24 of said record, is well written and is

logical in each of its details. The reasoning, which is supported both by logic and numerous authorities, is convincing to anyone who does not have a biased and prejudiced mind.

In concluding his brief in support of his Petition for Writ of Certiorari the petitioner argues that a prisoner who comes within the purview of the Act is in most cases financially unable to employ a lawyer or to procure witnesses to assist him in resisting the judgment of sexual sterilization authorized by the Act in question. The petitioner admits that this is not sufficient to invalidate the Act (page 26 of Petition for Writ of Certiorari and Brief in Support Thereof). We respectfully hasten to add that it would indeed be farcical and absurd for this to be the criterion, if the Courts based the validity of a legislative enactment upon a litigant's financial statement and his financial ability to present his side of a controversy. Certainly it would not be fair to the rights of the other party to a litigation and to future litigants relying on the legislation.

In conclusion, we call attention to the well known rule that every presumption is to be indulged in favor of the validity of a statute. *Whitney* v. *People of the State of California*, 47 S. Ct. 641, 274 U. S. 357, 71 L. Ed. 1095.

We further suggest and submit that if the Act cannot be applied to the petitioner because of the constitutional

inhibitions he advances, this fact does not render the Act invalid as applied to other persons not situated similarly to the petitioner.

CONCLUSION

The respondent respectfully submits that the Oklahoma Habitual Criminal Sterilization Act is not repugnant to, and does not violate, any of the constitutional provisions referred to by the petitioner, and that the said Oklahoma Act is a valid and constitutional legislative enactment; that said Act should be upheld and sustained in its entirety; and that the decision of the Supreme Court of Oklahoma in this cause should be upheld and affirmed.

Respectfully submitted,

MAC Q. WILLIAMSON,
Attorney General of Oklahoma,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 782.—October Term, 1941.

Jack T. Skinner, Petitioner,
vs.
The State of Oklahoma, ex rel. Mac Q. Williamson, Attorney General of the State of Oklahoma.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

[June 1, 1942.]

Mr. Justice Douglas delivered the opinion of the Court.

This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring. Oklahoma has decreed the enforcement of its law against petitioner, overruling his claim that it violated the Fourteenth Amendment. Because that decision raised grave and substantial constitutional questions, we granted the petition for certiorari.

The statute involved is Oklahoma's Habitual Criminal Steralization Act. Okl. Stat. Ann. Tit. 57, §§ 171, *et seq.*; L. 1935, pp. 94 *et seq.* That Act defines an "habitual criminal" as a person who, having been convicted two or more times for crimes "amounting to felonies involving moral turpitude" either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution. § 173. Machinery is provided for the institution by the Attorney General of a proceeding against such a person in the Oklahoma courts for a judgment that such person shall be rendered sexually sterile. §§ 176, 177. Notice, an opportunity to be heard, and the right to a jury trial are provided. §§ 177-181. The issues triable in such a proceeding are narrow and confined. If the court or jury finds that the defendant is an "habitual criminal" and that he "may be rendered sexually sterile without detriment to his or her general health", then the court "shall render judgment to the effect that said defendant be rendered sexually sterile" (§ 182) by the operation of vasectomy in case of a male and of salpingectomy in case of a female. § 174. Only one other provision of the Act is material here and that is

§ 195 which provides that "offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act."

Petitioner was convicted in 1926 of the crime of stealing chickens and was sentenced to the Oklahoma State Reformatory. In 1929 he was convicted of the crime of robbery with fire arms and was sentenced to the reformatory. In 1934 he was convicted again of robbery with firearms and was sentenced to the penitentiary. He was confined there in 1935 when the Act was passed. In 1936 the Attorney General instituted proceedings against him. Petitioner in his answer challenged the Act as unconstitutional by reason of the Fourteenth Amendment. A jury trial was had. The court instructed the jury that the crimes of which petitioner had been convicted were felonies involving moral turpitude and that the only question for the jury was whether the operation of vasectomy could be performed on petitioner without detriment to his general health. The jury found that it could be. A judgment directing that the operation of vasectomy be performed on petitioner was affirmed by the Supreme Court of Oklahoma by a five to four decision. — Okl. —, 115 P. 2d 123.

Several objections to the constitutionality of the Act have been pressed upon us. It is urged that the Act cannot be sustained as an exercise of the police power in view of the state of scientific authorities respecting inheritability of criminal traits.[1] It is argued that due process is lacking because under this Act, unlike the act[2] upheld in *Buck* v. *Bell*, 274 U. S. 200, the defendant is given no opportunity to be heard on the issue as to whether he is the probable potential parent of socially undesirable offspring. See *Davis* v. *Berry*, 216 Fed. 413; *Williams* v. *Smith*, 190 Ind. 526. It is also suggested that the Act is penal in character and that the sterilization provided for is cruel and unusual punishment and violative

[1] Healy, The Individual Delinquent (1915), pp. 188-200; Sutherland, Criminology (1924), pp. 112-118, 621-622; Gillin, Criminology and Penology (1926), c. IX; Popenoe, Sterilization and Criminality, 53 Rep. Am. Bar Assoc. 575; Myerson et al., Eugenical Sterilization (1936), c. VIII; Landman, Human Sterilization (1932), c. IX; Summary of the Report of the American Neurological Association Committee for the Investigation of Sterilization, 1 Am. Journ. Med. Jur. 253 (1938).

[2] And see State v. Troutman, 50 Ida. 673, 299 Pac. 648; Chamberlain, Eugenics in Legislatures and Courts, 15 Am. Bar Ass. Journ. 165; Castle, The Law and Human Sterilization, 53 Rep. Am. Bar Assoc., 556, 572; 2 Bill of Rights Review 54.

of the Fourteenth Amendment. See *Davis* v. *Berry, supra*. Cf. *State* v. *Feilen*, 70 Wash. 65; *Mickle* v. *Henrichs*, 262 Fed. 687. We pass those points without intimating an opinion on them, for there is a feature of the Act which clearly condemns it. That is its failure to meet the requirements of the equal protection clause of the Fourteenth Amendment.

We do not stop to point out all of the inequalities in this Act. A few examples will suffice. In Oklahoma grand larceny is a felony. Okl. Stats. Ann. Tit. 21, §§ 1705, 5. Larceny is grand larceny when the property taken exceeds $20 in value. *Id.* § 1704. Embezzlement is punishable "in the manner prescribed for feloniously stealing property of the value of that embezzled." *Id.* § 1462. Hence he who embezzles property worth more than $20 is guilty of a felony. A clerk who appropriates over $20 from his employer's till (*id.* § 1456) and a stranger who steals the same amount are thus both guilty of felonies. If the latter repeats his act and is convicted three times, he may be sterilized. But the clerk is not subject to the pains and penalties of the Act no matter how large his embezzlements nor how frequent his convictions. A person who enters a chicken coop and steals chickens commits a felony (*id.* § 1719); and he may be sterilized if he is thrice convicted. If, however, he is a bailee of the property and fraudulently appropriates it, he is an embezzler. *Id.* § 1455. Hence no matter how habitual his proclivities for embezzlement are and no matter how often his conviction, he may not be sterilized. Thus the nature of the two crimes is intrinsically the same and they are punishable in the same manners. Furthermore, the line between them follows close distinctions—distinctions comparable to those highly technical ones which shaped the common law as to "trespass" or "taking". Bishop, Criminal Law (9th ed.) Vol. 2, §§ 760, 799, *et seq.* There may be larceny by fraud rather than embezzlement even where the owner of the personal property delivers it to the defendant, if the latter has at that time "a fraudulent intention to make use of the possession as a means of converting such property to his own use, and does so convert it". *Bivens* v. *State*, 6 Okl. Cr. 521, 529, 120 Pac. 1033, 1036. If the fraudulent intent occurs later and the defendant converts the property, he is guilty of embezzlement. *Bivens* v. *State, supra*; *Flohr* v. *Territory*, 14 Okl. 477, 78 Pac. 565. Whether a particular act is larceny by fraud or embezzlement thus turns not on the intrinsic quality of the act but on when the felonious intent arose—a

question for the jury under appropriate instructions. *Bivens* v. *State, supra*; *Rile* v. *State*, 64 Okl. Cr. 183, 78 Pac. 2d 712.

It was stated in *Buck* v. *Bell, supra*, that the claim that state legislation violates the equal protection clause of the Fourteenth Amendment is "the usual last resort of constitutional arguments." 274 U. S. p. 208. Under our constitutional system the States in determining the reach and scope of particular legislation need not provide "abstract symmetry". *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144. They may mark and set apart the classes and types of problems according to the needs and as dictated or suggested by experience. See *Bryant* v. *Zimmerman*, 278 U. S. 63, and cases cited. It was in that connection that Mr. Justice Holmes, speaking for the Court in *Bain Peanut Co.* v. *Pinson*, 282 U. S. 499, 501, stated, "We must remember that the machinery of government would not work if it were not allowed a little play in its joints." Only recently we reaffirmed the view that the equal protection clause does not prevent the legislature from recognizing "degrees of evil" (*Truax* v. *Raich*, 239 U. S. 33, 43) by our ruling in *Tigner* v. *Texas*, 310 U. S. 141, 147, that "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." And see *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U. S. 362. Thus, if we had here only a question as to a State's classification of crimes, such as embezzlement or larceny, no substantial federal question would be raised. See *Moore* v. *Missouri*, 159 U. S. 673; *Hawker* v. *New York*, 170 U. S. 189; *Finley* v. *California*, 222 U. S. 28; *Patsone* v. *Pennsylvania, supra*. For a State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment. Nor is it prevented by the equal protection clause from confining "its restrictions to those classes of cases where the need is deemed to be clearest". *Miller* v. *Wilson*, 236 U. S. 373, 384. And see *McLean* v. *Arkansas*, 211 U. S. 539. As stated in *Buck* v. *Bell, supra*, p. 208, ". . . . . the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow."

But the instant legislation runs afoul of the equal protection clause, though we give Oklahoma that large deference which the rule of the foregoing cases requires. We are dealing here with legislation which involves one of the basic civil rights of man.

Marriage and procreation are fun ntal to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws. The guaranty of "equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369. When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. *Yick Wo* v. *Hopkins, supra; Gain* v. *Canada*, 305 U. S. 337. Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. Oklahoma's line between larceny by fraud and embezzlement is determined, as we have noted, "with reference to the time when the fraudulent intent to convert the property to the taker's own use" arises. *Riley* v. *State, supra*, p. 189, 78 P. 2d p. 715. We have not the slightest basis for inferring that that line has any significance in eugenics nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses. In terms of fines and imprisonment the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to steralization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn. See *Smith* v. *Wayne Probate Judge*, 231 Mich. 409, 420-421. In *Buck v. Bell, supra*, the Virginia statute was upheld

though it applied only to feeble-minded persons in institutions of the State. But it was pointed out that "so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached." 274 U. S. p. 208. Here there is no such saving feature. Embezzlers are forever free. Those who steal or take in other ways are not. If such a classification were permitted, the technical common law concept of a "trespass" (Bishop, Criminal Law (9th ed.) vol. 1, §§ 566, 567) based on distinctions which are "very largely dependent upon history for explanation" (Holmes, The Common Law, p. 73) could readily become a rule of human genetics.

It is true that the Act has a broad severability clause.[3] But we will not endeavor to determine whether its application would solve the equal protection difficulty. The Supreme Court of Oklahoma sustained the Act without reference to the severability clause. We have therefore a situation where the Act as construed and applied to petitioner is allowed to perpetuate the discrimination which we have found to be fatal. Whether the severability clause would be so applied as to remove this particular constitutional objection is a question which may be more appropriately left for adjudication by the Oklahoma court. *Dorchy* v. *Kansas*, 264 U. S. 286. That is reemphasized here by our uncertainty as to what excision, if any, would be made as a matter of Oklahoma law. Cf. *Smith* v. *Cahoon*, 283 U. S. 553. It is by no means clear whether if an excision were made, this particular constitutional difficulty might be solved by enlarging on the one hand or contracting on the other (cf. Mr. Justice Brandeis dissenting, *National Life Insurance Co.* v. *United States*, 277 U. S. 508, 534-535) the class of criminals who might be sterilized.

Reversed.

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[3] Sec. 194 provides:

"If any section, sub-section, paragraph, sentence, clause or phrase of this Act shall be declared unconstitutional, or void for any other reason by any court of final jurisdiction, such fact shall not in any manner invalidate or affect any other or the remaining portions of this Act; but the same shall continue in full force and effect. The Legislature hereby declares that it would have passed this Act, and each section, sub-section, paragraph, sentence, clause or phrase thereof, irrespective of the fact that any one or more other sections, sub-sections, paragraphs, sentences, clauses or phrases be declared unconstitutional."

SUPREME COURT OF THE UNITED STATES.

No. 782.—October Term, 1941.

Jack T. Skinner, Petitioner, *vs.* The State of Oklahoma, ex rel. Mac Q. Williamson, Attorney General of the State of Oklahoma.	On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

[June 1, 1942.]

Mr. Chief Justice Stone concurring.

I concur in the result, but I am not persuaded that we are aided in reaching it by recourse to the equal protection clause.

If Oklahoma may resort generally to the sterilization of criminals on the assumption that their propensities are transmissible to future generations by inheritance, I seriously doubt that the equal protection clause requires it to apply the measure to all criminals in the first instance, or to none. See *Rosenthal* v. *New York*, 226 U. S. 260, 271; *Keokee Coke Co.* v. *Taylor*, 234 U. S. 224, 227; *Patsone v. Pennsylvania*, 232 U. S. 138, 144.

Moreover, if we must presume that the legislature knows—what science has been unable to ascertain—that the criminal tendencies of any class of habitual offenders are transmissible regardless of the varying mental characteristics of its individuals, I should suppose that we must likewise presume that the legislature, in its wisdom, knows that the criminal tendencies of some classes of offenders are more likely to be transmitted than those of others. And so I think the real question we have to consider is not one of equal protection, but whether the wholesale condemnation of a class to such an invasion of personal liberty, without opportunity to any individual to show that his is not the type of case which would justify resort to it, satisfies the demands of due process.

There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned (see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4) and where the presumption is resorted to only to dispense with a procedure which the ordinary dictates of prudence would seem to demand for the protection of the individual from arbitrary action. Although petitioner here was given

a hearing to ascertain whether sterilization would be detrimental to his health, he was given none to discover whether his criminal tendencies are of an inheritable type. Undoubtedly a state may, after appropriate inquiry, constitutionally interfere with the personal liberty of the individual to prevent the transmission by inheritance of his socially injurious tendencies. *Buck* v. *Bell*, 274 U. S. 200. But until now we have not been called upon to say that it may do so without giving him a hearing and opportunity to challenge the existence as to him of the only facts which could justify so drastic a measure.

Science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable. But the State does not contend—nor can there be any pretense—that either common knowledge or experience, or scientific investigation,[1] has given assurance that the criminal tendencies of any class of habitual offenders are universally or even generally inheritable. In such circumstances, inquiry whether such is the fact in the case of any particular individual cannot rightly be dispensed with. Whether the procedure by which a statute carries its mandate into execution satisfies due process is a matter of judicial cognizance. A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process. *Morrison* v. *California*, 291 U. S. 82, 90, and cases cited; *Taylor* v. *Georgia*, 315 U. S. —. And so, while the state may protect itself from the demonstrably inheritable tendencies of the individual which are injurious to society, the most elementary notions of due process would seem to require it to take appropriate steps to safeguard the liberty of the individual by affording him, before he is condemned to an irreparable injury in his person, some opportunity to show that he is without such inheritable tendencies. The state is called on to sacrifice no permissible end when it is required to reach its objective by a reasonable and just procedure adequate to safeguard rights of the individual which concededly the Constitution protects.

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[1] See Eugenical Sterilization, A Report of the Committee of the American Neurological Association (1936), pp. 150-52; Myerson, Summary of the Report, 1 American Journal of Medical Jurisprudence 253; Popenoe, Sterilization and Criminality, 53 American Bar Ass'n Reports 575; Jennings, Eugenics, 5 Encyclopedia of the Social Sciences 617, 620-21; Montagu, The Biologist Looks at Crime, 217 Annals of American Academy of Political and Social Science 46.

SUPREME COURT OF THE UNITED STATES.

No. 782.—October Term, 1941.

Jack T. Skinner, Petitioner, *vs.* The State of Oklahoma.	On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

[June 1, 1942.]

Mr. Justice Jackson concurring.

I join the Chief Justice in holding that the hearings provided are too limited in the context of the present Act to afford due process of law. I also agree with the opinion of Mr. Justice Douglas that the scheme of classification set forth in the Act denies equal protection of the law. I disagree with the opinion of each in so far as it rejects or minimizes the grounds taken by the other.

Perhaps to employ a broad and loose scheme of classification would be permissible if accompanied by the individual hearings indicated by the Chief Justice. On the other hand, narrow classification with reference to the end to be accomplished by the Act might justify limiting individual hearings to the issue whether the individual belonged to a class so defined. Since this Act does not present these questions, I reserve judgment on them.

I also think the present plan to sterilize the individual in pursuit of a eugenic plan to eliminate from the race characteristics that are only vaguely identified and which in our present state of knowledge are uncertain as to transmissibility presents other constitutional questions of gravity. This Court has sustained such an experiment with respect to an imbecile, a person with definite and observable characteristics, where the condition had persisted through three generations and afforded grounds for the belief that it was transmissible and would continue to manifest itself in generations to come. *Buck* v. *Bell*, 274 U. S. 200.

There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes. But this Act falls down before reaching this problem, which I mention only to avoid the implication that such a question may not exist because not discussed. On it I would also reserve judgment.